Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

JACK B. BUSTER; JANICE SUE JOHNSON; HORIZONS WEST, INC.; SCORPIO, INC.; WESTERN INVESTMENT TRUST; SUSAN BENDICT, Trustee of Western Investment Trust; and WESTWOOD ACRES, an Alaskan Limited Partnership,

Petitioners,

v.

THOMAS, HEAD & GREISEN EMPLOYEES TRUST; RONALD E. GREISEN; and HENRY P. HEAD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Did the District Court have subject matter jurisdiction over claims against non-parties to the original action to invalidate alleged fraudulent conveyances?

2. Did the District Court have subject matter jurisdiction over the property and membership of a non-party limited partnership?

3. Did the District Court have personal jurisdiction to enter a judgment affecting the property and membership of a limited partnership which had not been named as a party or served with process?

4. Did the District Court deny due process of law in entering a default judgment against the petitioners?

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I. PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals filed September 19, 1996, Case Nos. 94-35872 and 95-35619, reprinted as Appendix A hereto, in order to resolve conflicts between that court and the opinions of this Court, the Alaska Supreme Court and the Eleventh Circuit Court of Appeals on the issues presented herein.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is being timely filed in accordance with 28 U.S.C. § 2101(c).

III. APPLICABLE STATUTES AND RULES

In the underlying litigation, Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114 (9th Cir. 1994), cert. denied, 115 S.Ct. 935 (1995), Mr. Buster, his partner and their partnership were held to be fiduciaries to a

trust formed pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., and a judgment in the amount of $142,745.71 was awarded against them and affirmed on appeal. The partner settled for approximately $85,000 and Buster proposed to post a $125,000 cash supersedeas bond pending his appeal, but that proposal was rejected. During the appeal, in supplemental proceedings, Thomas, Head & Greisen ("TH & G") added additional parties seeking to set aside allegedly fraudulent conveyances made by Buster. Statutes and rules relating to those proceedings include the following:

Alaska Statutes 34.40.010. Invalidity generally:

> A conveyance or assignment, in writing or otherwise, of an estate or interest in land, or in goods, or things in action, or of rents or profits issuing from them or a charge upon land, goods, or things in action, or upon the rents or profits from them, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, or a bond or other evidence of debt given, action commenced, decree or judgment suffered,

with the like intent, as against the persons so hindered, delayed, or defrauded is void.

Alaska Statutes 09.38.100. Debtor's Property Owned With Another:

(b) A partner's right in specific partnership property is exempt except on a claim against the partnership. If partnership property is attached for a partnership debt, the partners or any of them or the representatives of a deceased partner may not claim an exemption for that property under this chapter.

Alaska Statutes 32.11.340. Rights of Creditor:

On application to a court of competent jurisdiction by a judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent charged, the judgment creditor has only the rights of an assignee of the partnership interest. This chapter does not deprive a partner of the benefit of an exemption law applicable to the partner's partnership interest.

Alaska Statutes 32.11.350. Right of Assignee to Become Limited Partner:

(a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that

(1) the assignor gives the assignee

that right in accordance with authority described in certificate of limited partnership; or

(2) all other partners consent.

Fed. R. Civ. P. 69. Execution:

(a) **In General.** Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. ....

Alaska R. Civ. P. 69:

(a) **Execution - Discovery.** Process to enforce a judgment shall be by a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with these rules and applicable statutes. In aid of the judgment or execution, the judgment creditor or a successor in interest, when the interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

Alaska R. Civ. P. 89. Attachment:

(a) **Prejudgment Attachment; Availability.** After a civil action is commenced, the plaintiff may apply to the court to have the property of the defendant attached under AS 09.40.010-.110 as security for satisfaction of a judgment that may be recovered. The court may issue the writ of attachment in accordance with the provisions of this rule. However, no writ may be issued unless the plaintiff has provided a written undertaking with sufficient sureties as ordered by the court.

Any party bringing a claim against another party may utilize prejudgment attachment procedures and is considered a plaintiff for purposes of this rule.

(b) **Motion and Affidavit for Attachment.** The plaintiff shall file a motion with the court requesting the writ of attachment, together with an affidavit showing:

(1) That the action is one upon an express or implied contract for the payment of money, and the facts and circumstances relating thereto; and

(2) That the sum for which the attachment is asked is an existing debt due and owing from the defendant to the plaintiff, over and above all legal setoffs and counterclaims, and the facts and circumstances relating thereto; and

* * *

(c) **Notice of Motion; Pre-Attachment Hearing.** Except as section (m) provides, the court may issue the writ of attachment only after:

(1) The defendant is served with notice of the motion and a copy of the affidavit; and

(2) The defendant is given an opportunity for a judicial hearing to determine the necessity of and justification for the pre-judgment attachment of the property. ....

* * *

(d) **Hearing; Burden of Proof.** At the hearing the court shall require the plaintiff to establish by a preponderance of the evidence the probable validity of the plaintiff's claim for relief in the action and the absence of any reasonable probability that a successful defense can be asserted by the defendant.

* * *

(l) **Garnishee Proceedings.**

(1) Order of Appearance - Service. When a person is ordered to appear before the court to be examined as to any property or debt held by the person belonging to a defendant, such person shall be known as the garnishee. The order shall state the time and place where the garnishee is to appear, shall

be served upon the garnishee and return of service made in the manner provided for service of summons and return thereof in Rule 4.

* * *

(4) Trial of Issues of Fact. Issues of fact arising between the plaintiff and the garnishee shall be resolved and disposed of in accordance with these rules as in the case of issues of fact arising between plaintiff and defendant. Witnesses, including the defendant and garnishee, may be required to appear and testify as upon the trial of an action.

Judgment Against Garnishee. If it shall be found that the garnishee, at the time of service of the writ of attachment and notice, had any property of the defendant liable to attachment beyond the amount admitted in the garnishee's statement, or in any amount if a statement is not furnished, judgment may be entered against the garnishee for the value of such property in money. ....

* * *

(7) Execution. Execution may issue upon a judgment against a garnishee as upon a judgment between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner.

IV. STATEMENT OF THE CASE

While Buster's appeal was pending, TH & G, being unsuccessful in collecting the judgment from Buster, filed an amended complaint adding the other petitioners, except Westwood Acres Limited Partnership (referred to herein as "WWA")[1], as defendants and seeking to set aside allegedly fraudulent conveyances. After Buster's partner had settled with TH & G for approximately $85,000, Buster filed a motion for the court to approve a cash supersedeas bond in the amount of $125,000 and arranged for other persons to deposit that sum of money in his attorney's trust account. Upon opposition by TH & G, the District Court disapproved and required a supersedeas bond in the amount of $165,000, which was affirmed by the Court of Appeals. Buster being unable to provide that amount of money, the $125,000 was

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[1]TH & G never named WWA as a party or served any kind of process on it.

returned to the persons who had sent it to Buster's attorney.

Shortly after the entry of the judgment, the District Court enjoined Buster from making any transfers of property. There is no evidence that Buster has violated that injunction. More than a year and a half before the judgment, Buster had transferred most of the property involved in TH & G's claims to Scorpio, Inc., a corporation of which at that time Buster was the owner of all stock. There is no record of any transfer of any property interest by Buster after January 1992, approximately seven months prior to any judgment against Buster. Any transfers after the judgment were made by transferees from Buster or by transferees of the transferees from Buster.

Upon adding the petitioners other than Buster and WWA as defendants,[2] TH & G applied for

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[2]The Court of Appeals has referred to these parties collectively as the "Johnson parties." Their interests in this petition being similar, and for sake of continuity, they will be referred

a temporary restraining order, which was extended from time to time by stipulation, while it appeared that Buster may be able to post a supersedeas bond. Upon rejection of Buster's bond proposal, TH & G applied for a preliminary injunction and for the court to require the $125,000 which had been in Buster's attorney's trust account to be deposited with the court. Buster objected that the court could not require him to post a supersedeas bond and that he had no ability to deposit such a sum of money with the court. Buster did not oppose the other provisions of the proposed preliminary injunction, because there was already an injunction against him. As to the Johnson parties, it was pointed out that requiring them to deposit money with the court would be a pre-judgment attachment. The District Court granted the preliminary injunction, including the

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to in this petition as the "Johnson parties."

mandatory deposit requirement.

No one deposited $125,000 with the court. TH & G applied for an order to show cause. The District Court requested briefing on the motion. The Johnson parties filed opposition, but Buster, having three times previously advised the court that he could not deposit the money and objected to the requirement that he post a supersedeas bond, did not file timely opposition to the motion, anticipating responding if the court issued an order to show cause. But the District Court did not issue an order to show cause; instead, it issued an order entering the default of Buster and the Johnson parties because they had no complied with the mandatory deposit requirement. More than a year later, the District Court entered a default judgment, which contained provisions affecting the property and membership of WWA, which had not been named a party or served with any process. The default

judgment is reproduced herein as Appendix B.

Based on the default judgment, the District Court subsequently appointed a receiver of Westwood Acres and directed him to freeze its bank accounts. WWA then appeared as an intervenor and moved that the order appointing a receiver be vacated or modified. The order was modified to unfreeze the bank accounts.

WWA moved for relief from the judgment pursuant to Fed. R. Civ. P. 60(b)(4) on the basis that the judgment was void for lack of subject matter and personal jurisdiction. The District Court denied the motion. The United States Marshal conducted a sale of the limited partnership shares of WWA, which had been transferred by Buster a year and a half prior to the judgment, having a book value of approximately $140,000, and TH & G was the successful bidder in the amount of $2,500. WWA appealed. The District Court subsequently

reinstated the receivership order freezing WWA's bank accounts.

V. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

A. The District Court Lacked Subject Matter Jurisdiction Over the Claims Against the Johnson Parties and WWA.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, ..." Kokkonen v. Guardian Life Insurance Co. of America, __ U.S. __, 114 S.Ct. 1673, 1675 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, ... and the burden of establishing the contrary rests upon the party asserting jurisdiction, ..." Id. In Peacock v. Thomas, __ U.S. __, 116 S.Ct. 862, 867-69 (1996), this Court held that, absent an independent basis for federal jurisdiction, a new defendant may not be joined in a supplementary proceeding to pierce the corporate veil. That case originated under ERISA, as did this case. The Court of Appeals

distinguishes Peacock from this case on the basis that in Peacock a new defendant not a party to the original suit was added to establish the defendant's liability, by piercing the corporate veil, for the original judgment. The Court of Appeals suggests that in this case, the new defendants were added only to disgorge from them property which had been wrongfully transferred to them. This appears to be a distinction without a difference. To the extent they were in possession of property which may be available to satisfy the judgment, or proceeds therefrom, the new defendants would become liable to pay the original judgment to the extent of such property, or the proceeds therefrom. Under Alaska law, judgment may be entered against the new defendants for the value of any money or property of the original defendant which have been liable to attachment. See, Alaska R. Civ. P. 89(l)(5), quoted supra.

The Court of Appeals' reliance on Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329, 333 (1887) is misplaced. In that case, the assignee was added as a defendant in the equitable counterclaim asserted in the original suit, not after final judgment had been entered, and the counterclaim was brought under a West Virginia statute authorizing suits to set aside fraudulent conveyances in assistance of an anticipated judgment or decree against the conveying debtor. See Appendix, A16. Alaska has no statute or rule equivalent to the West Virginia statute relied on in Dewey.

Obviously Fed. R. Civ. P. 69(a) was not in effect at the time Dewey was decided. but it did not materially change the law. Under Dewey, the District Court had jurisdiction to proceed according to the law of West Virginia and in this case, it had jurisdiction only to proceed in accordance with the law and practice in effect in

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Obviously Fed. R. Civ. P. 69(a) was not in effect at the time Dewey was decided, but it did not materially change the law. Under Dewey, the District Court had jurisdiction to proceed according to the law of West Virginia and in this case, it had jurisdiction only to proceed in accordance with the law and practice in effect in

Alaska. The law and practice in effect in Alaska is for fraudulent conveyances to be set aside, an original action is filed against the recipients naming them as defendants and allowing them the opportunity to defend. First National Bank v. Enzler, 537 P.2d 517 (Alaska 1975); Blumenstein v. Phillips Insurance Center, Inc., 490 P.2d 1213 (Alaska 1971). Under Alaska law, the petitioners, as parties to a proceeding adjudicating ownership of personal or real property, are entitled to a jury trial. Keltner v. Curtis, 695 P.2d 1076, 1079 (Alaska 1985). Notwithstanding the Court of Appeals' reliance on Keltner and Great Western Savings Bank v. George W. Easley Co., JV, 778 P.2d 569 (Alaska 1989), the Alaska Supreme Court has never held, approved of, or hinted that an action to set aside allegedly fraudulent conveyances may be pursued against non-parties to the original actions in supplemental proceedings. In Great Western, the

bank was named as a defendant in the origina complaint and in Keltner, the lien claimant voluntarily intervened in the original action Nothing in those decisions suggests that i supplemental proceedings after judgment, non parties to the original action may be added a defendants in an action to set aside a fraudulen conveyance. Thus, the Court of Appeals has foun ancillary jurisdiction to exist where it ha never before existed under Alaska law an practice. Such a holding does not recognize th presumption that a cause of action lies outsid the limited jurisdiction of a federal court an it shifts the burden of establishing whether o not jurisdiction exists from the party assertin jurisdiction to the parties denying it. See Kokkonen, supra.

B. The District Court Lacked Subject Matter Jurisdiction Over the Property and Membership of WWA.

Mr. Buster was the general partner of WWA and prior to January 3, 1991 he had been the owner of 23 of 40 limited partnership units, the remaining 17 units being owned by 11 persons who have not in any way been involved in this lawsuit. On January 3, 1991, Mr. Buster assigned his 23 units and the assignee, in the manner prescribed by the certificate of limited partnership, became a limited partner. The default judgment declared the assignment void, thereby dictating to WWA membership in the limited partnership, without compliance with the certificate or the applicable statute, AS 32.11.350, quoted above. See Appendix, B14 - B16. Pursuant to the default judgment, the District Court appointed a receiver not only to exercise the rights of an assignee, but to seize partnership property by freezing bank accounts,

contrary to AS 09.38.100(b) and AS 32.11.340, quoted above. Not only that, the court ordered the sale of the limited partnership units which had belonged to Buster by the Marshal, at which sale TH & G could bid by offset. The original order appointing the receiver was, upon application of WWA, modified to unfreeze the bank accounts, but subsequently reinstated. All of this was done contrary to the applicable statutory provisions of Alaska, AS 09.38.100(b) and AS 32.11.340.

WWA was organized and exists as a limited partnership pursuant to Alaska law. The states possess exclusive jurisdiction and sovereignty over the persons and property within their territories and have the power to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity

shall be determined and their obligations enforced. C. Wright and A. Miller, 4 Federal Practice & Procedure, § 1064. The District Court, being a court of limited jurisdiction, is presumed not to have subject matter jurisdiction over the contractual limited partnership entity and its property unless the basis of its jurisdiction is alleged in a complaint and established. There was no allegation in the complaint that the District Court had jurisdiction over WWA, its membership or its property. Nevertheless, the District Court invaded the limited partnership, its membership and property in the default judgment, Appendix, B14 - B16, contrary to the specific provisions of applicable Alaska Statutes.

C. The District Court Lacked Personal Jurisdiction Over WWA.

Service of process in a sufficient manner to obtain jurisdiction over a party is necessary to satisfy due process of law. C. Wright and A.

Miller, 4 Federal Practice and Procedure, § 1064. The fundamental requisite of due process of law is the opportunity to be heard and the hearing must be at a meaningful time and in a meaningful manner. United States v. Alter, 482 F.2d 1016, 1024 (9th Cir. 1973). No process of any kind has ever been served on WWA in this case. In denying the motion for relief from judgment, the District Court said, "Westwood Acres is an instrumentality of Jack Buster and is in privity with him at least to the extent of his management and supervision of the partnership." In other words, the District Court took the view that because Buster "individually" was a party represented by an attorney who received service by mail, that was sufficient service of process on WWA, because Buster was the general partner of that limited partnership. That disregards the principle that acts performed by the same person in two different capacities are treated as transactions

of two different legal personages. Bender v. Williamsport Area School District, 475 U.S. 534, 543 n. 6, 106 S.Ct. 1326, 1332 n. 6, 89 L.Ed.2d 501 (1986). It also disregards the fact that an attorney retained to represent Mr. Buster's individual interests may not readily recognize the interests of a limited partnership which he has not been retained to represent.

Under Alaska law, it would be proper to charge any interest of Mr. Buster in WWA to pay the judgment against Mr. Buster. This, of course, is called a "charging order," which is equivalent to garnishee proceedings provided in Alaska R. Civ. P. 89(1), quoted above. These proceedings have been meticulously discussed by the Alaska Supreme Court in Beery v. Browning, 717 P.2d 365 (Alaska 1986). A writ, or notice of levy, must be served pursuant to Alaska R. Civ. P. 89(f)(3). 717 P.2d at 367. The writ must specify the property attached and a certified

copy must be left with the person having possession of such property. Id. The court continues:

> Given the serious consequences of garnishment, i.e., potential liability to judgment-creditor and debtor, we must insist on strict compliance with the notice requirements.

Id. n. 8. The court explains further:

> Both fairness and the policy of strict construction required Beery to provide a written notice of garnishment, not just a specification of garnishment property. ....
>
> The garnishee is merely a neutral stakeholder caught up in the underlying dispute between judgment-creditor and debtor. .... Until properly served, the garnishee owes primary loyalty to his own creditor, i.e., the judgment-debtor. .... The proper service of garnishment papers then immediately imposes duties and potential liabilities upon the garnishee in favor of the judgment-creditor. .... Potentially liable to either party, the garnishee should not have to guess whether the garnishor has complied with the law.

Nothing was done in this case to obtain personal jurisdiction over WWA, either pursuant

to Fed. R. Civ. P. 4 or Alaska R. Civ. P. 89(l). In absence of strict compliance with the notice requirements, all orders of the District Court affecting Westwood Acres are void and the District Court should have granted the motion for relief from judgment.

D. The District Court Denied Due Process of Law to All Petitioners in Rendering the Default Judgment.

The District Court entered the default of Buster and the Johnson parties as a contempt sanction for failure to deposit $125,000 with the court as required by a "preliminary injunction."[3] The deposit requirement of the preliminary injunction was transparently invalid and should not have been the basis of a contempt sanction. Federal Trade Commission v. American National Cellular, 868 F.2d 315, 317 (9th Cir. 1989).

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[3]No default was entered as to WWA, because it was not a party. But the District Court included provisions in the default judgment which amounted to a judgment against WWA. See App. B.

The District Court did not comply with the procedure or substance required for a preliminary injunction.

> In this circuit, to meet the criteria for preliminary injunctive relief, the moving party must demonstrate "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.

Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988). The District Court granted the preliminary injunction on the basis of allegations of counsel without any showing that TH & G would suffer irreparable injury if the $125,000 was not deposited with the court and without any consideration of resulting hardships to the defendants. The District Court did not follow the admonishment of this Court that "every precaution should be taken that orders issue ..., only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order." Maggio v.

Zeitz, 333 U.S. 56, 69, 68 S.Ct. 401, 408, 92 L.Ed. 476 (1948). The District Court did precisely what this Court has cautioned against doing: it issued an order creating a duty which was impossible of performance, so that punishment could follow. Maggio, 333 U.S. at 64, 68 S.Ct. at 405.

As to the Johnson parties, the deposit requirement was clearly a pre-judgment attachment of their property. But the District Court did not follow the procedure prescribed by Alaska R. Civ. P. 89, quoted above. The court did not hold a hearing as required by that rule and there was no showing of "the absence of any reasonable probability that a successful defense can be asserted by [those defendants]." Alaska R. Civ. P. 89(d).

The District Court gave no heed to the due processes prescribed by the applicable rules of civil procedure for issuing preliminary

injunctions and pre-judgment attachments. Because of this, the deposit requirement of the preliminary injunction was transparently invalid. Sanctions for contempt may be imposed only for violation of valid orders.

Not only did the District Court disregard due process as to the injunction, it did so again in imposing the sanction. TH & G filed a motion for an order to show cause and the defendants anticipated showing cause if such an order were issued. But the District Court never issued an order to show cause; it merely imposed sanctions. Due process requires a five-step process, to-wit: (1) deciding whether or not to grant the motion for a show cause order; (2) issuing the show cause order; (3) providing a hearing; (4) making a finding as to contempt; (5) imposing sanctions. Citronelle-Mobile Gathering, Inc. v. Watkins, 543 F.2d 1297, 1304 (11th Cir. 1991). That court explained:

Sanctions may be imposed to coerce the

> contemnor to comply with the court's order, but may not be so excessive as to be punitive in nature. .... The court's discretion, however, "must stay within the bounds of due process." .... Due process requires that the court inform the alleged contemnor of the contemptuous conduct and provide a hearing in which the alleged contemnor may explain why the court should not make a contempt finding. .... Although the District Court has the authority to impose sanctions designed to ensure compliance, the sanctions cannot be any greater than necessary to ensure such compliance.

(Citations omitted). In this case, TH & G filed a motion, the District Court allowed an opportunity to oppose the motion for issuance of an order to show cause and then instead of granting or denying the motion, the court imposed sanctions by entering the default of the defendants, which led to the default judgment. Instead of a five-step process, the District Court merely imposed sanctions.

VI. CONCLUSION

For the foregoing reasons, the petitioners request this Court to grant a writ of certiorari.

Respectfully submitted the 18th day of December, 1996.

G. JEFFERSON CAMPBELL, Jr., P.C.

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By: A. Petersen
A. Lee Petersen

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on the 18th day of December, 1996, I served two copies of the foregoing Petition on A. Michael Zahare, Esq., Attorney for the Respondents, at 431 West 7th Avenue, Suite 207, Anchorage, AK 99501, by U. S. Mail.

A. Petersen
A. Lee Petersen

A P P E N D I X

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS, HEAD AND GREISEN EMPLOYEES TRUST; RONALD E. GREISEN; and HENRY P. HEAD, Plaintiffs-Appellees, v. JACK B. BUSTER; JANICE SUE BUSTER, aka JANICE SUE JOHNSON; HORIZONS WEST, INC., an Oregon Corporation; SCORPIO, INC., an Alaska Corporation; WESTERN INVESTMENT TRUST; SUSAN BENEDICT, Trustee of the Western Investment Trust, Defendants-Appellants.	No. 94-35872 D.C. No. CV-89-00071-JAV OPINION

Appeal from the United States District Court
for the District of Alaska
James A. von der Heydt, District Judge, Presiding

Argued and Submitted
May 7, 1996--Seattle, Washington

Filed September, 19, 1996

Before: Donald P. Lay,* Herbert Y.C. Choy and
Edward Leavy, Circuit Judges

Opinion by Judge Lay

* Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION

LAY, Circuit Judge:

In Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114 (9th Cir. 1994), cert. denied, 115 S.Ct. 935 (1995), this court affirmed a judgment of $142,745.71 against Jack Buster and others not parties to this appeal under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. The district court ruled in favor of Thomas, Head & Greisen Employees Trust, Ronald Greisen, and Henry Head (collectively, "Thomas, Head") upon finding that Buster breached his fiduciary duties to Thomas, Head in the sale of certain deed-of-trust notes.

The initial appeal (No. 94-35872) arises out of supplementary proceedings in which Thomas, Head has attempted to execute on its judgment against Buster. In February 1993, Thomas, Head amended its complaint to join as defendants

Janice Sue Buster, a/k/a Janice Sue Johnson, Horizons West, Inc., Scorpio, Inc., Susan Benedict, trustee of the Western Investment Trust (collectively, "the Johnson parties"), and others not party to this appeal. The amended complaint alleges that Buster fraudulently transferred various properties to the Johnson parties in an effort to avoid payment of the judgment. The district court[1] denied the Johnson parties' motion to dismiss the supplementary proceeding for lack of jurisdiction and subsequently entered a preliminary injunction freezing certain assets and requiring Buster and the Johnson parties to deposit $125,000 into the court registry. When Buster and the Johnson parties failed to deposit the money or to show cause for their failure to do so, the court held them in contempt, declared them in default, and later entered default

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[1]The Honorable James A. von der Heydt, presiding.

judgment against them on Thomas, Head's fraudulent conveyance claims. Buster and the Johnson parties appeal the default judgment against them.

The above appeal has been consolidated with a second appeal (No. 95-35619) by Westwood Acres ("Westwood"), a limited partnership in which Buster is the general partner. Westwood attacks the validity of the default judgment as it relates to its property. At the time of the default judgment, Westwood was not a party to the supplementary proceedings. Shortly thereafter, however, the magistrate judge[2] entered an order, pursuant to the default judgment against Buster and the Johnson parties, appointing a receiver to freeze Westwood's bank accounts and distributions to prevent the dissipation of Buster and the Johnson parties' assets. Westwood moved to intervene and to vacate or modify the order

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[2]The Honorable John D. Roberts.

appointing a receiver. The magistrate judge modified the order, and whether the modification or the underlying receivership was proper is not an issue before us in this appeal. Following notice of the sale of Buster's limited partnership interest in Westwood, however, Westwood made another motion, pursuant to Fed. R. Civ. P. 60(b)(4), for relief from the default judgment. The district court[3] denied the Rule 60(b)(4) motion, and Westwood appeals its denial.

I

Thomas, Head commenced this supplementary proceeding, alleging that Buster had fraudulently conveyed his assets to the Johnson parties in violation of Alaska law. Buster and the Johnson parties assert that, under Fed. R. Civ. P. 69(a) and the Alaska procedure it incorporates, a judgment creditor must bring an independent

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[3]The Honorable James K. Singleton, presiding.

action in state court to set aside the post-judgment fraudulent conveyances of a judgment debtor. Rule 69(a) provides in relevant part:

> The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Alaska Supplementary Procedure

The Johnson parties and Buster urge that Alaska R. Civ. P. 69 does not permit judgment creditors to maintain supplementary fraudulent conveyance proceedings against nonparties to the underlying action.[4] Although Alaska R. Civ. P.

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[4]Under Alaska law, transferees are indispensable parties in actions to recover fraudulent conveyances. Sylvester v. Sylvester, 723 P.2d 1253, 1259 (Alaska 1986)("Both longstanding common law and cases arising under comparable versions of [Alaska's] Civil Rule 19 hold a grantee of an alleged fraudulent conveyance indispensable to a proceeding to strike the transfer."). Thus, Thomas, Head was required to join the Johnson parties in order to

69 does not expressly authorize postjudgment fraudulent conveyance actions, Alaska Rule 69(c) provides that "the court may make an order restraining the judgment debtor from selling, transferring, or in any manner disposing of any of his property liable to execution pending the proceeding." Alaska procedure thus permits the use of postjudgment orders to prevent fraudulent conveyances. Since Federal Rule 69(a) is in substance a choice-of-law provision not "meant to put the judge into a procedural straitjacket, whether of state or federal origin," Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221, 1226 (7th Cir. 1993), we think "[t]he procedure followed here ... accord[ed] with the spirit of the Rules and ... [was] a sufficiently close adherence to state procedures." See Chambers v. Blickle Ford

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raise its fraudulent conveyance claims.

Sales, Inc., 313 F.2d 252, 256 (2d Cir. 1963).[5]

The Alaska Supreme Court has twice upheld a trial court's exercise of jurisdiction over supplementary proceedings not expressly authorized by Alaska Rule 69. In Keltner v. Curtis, 695 P.2d 1076 (Alaska 1985), the judgment creditor sought to execute on property within the judgment debtor's possession. Two third parties filed claims to the property under Alaska Stat. § 09.35.130, which delineates the circumstances in which property levied upon by a third party may be retained by its possessor. The trial court held an evidentiary hearing to resolve the ownership dispute. The Alaska Supreme Court

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[5]Buster and the Johnson parties rely on two Alaska cases, First National Bank v. Enzler, 537 P.2d 517 (Alaska 1975), and Blumenstein v. Phillips Insurance Center, Inc., 490 P.2d 1213 (Alaska 1971), in support of their argument that fraudulent conveyance claims may not be raised in supplementary proceedings. These cases, however, do not support their contention; they simply illustrate fraudulent conveyance claims raised in ordinary, nonsupplementary proceedings under Alaska law.

upheld the lower court's jurisdiction, reasoning that, although § 09.35.130 did not grant the court authority to determine title to the property, it had inherent power to do so because the ownership determination was "reasonably necessary to the fair administration of justice." Id. at 1079 n. 4.

Similarly, in Great Western Savings Bank v. George W. Easley Co., 778 P.2d 569 (alaska 1989), the trial court entered an order subordinating a construction lender's deed of trust to a general contractor's mechanics' lien. On appeal, the Alaska Supreme Court ruled that, because it was affirming a money judgment against the lender, "the order of subordination can be viewed as an order in aid of collection of the judgment which is within the inherent power of the court." Id. at 581. In a footnote to this passage, the court stated that "'[a] court of equity has power to entertain an action which has for its purpose the

enforcement of a judgment in order that complete justice may be done to the parties in interest as the exigencies of the case or the interests of justice may require.'" Id. at 581 n. 12 (quoting Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856)).

Buster and the Johnson parties note that the third parties in Keltner voluntarily filed their ownership claims with the court, and that the subordination of the deed of trust to the mechanics' lien in Great Western involved the original parties. We do not find those distinctions dispositive. Keltner and Great Western together suggest that the Alaska Supreme Court approves of a broad exercise of jurisdiction over third-party claims as "the exigencies of the case or the interests of justice may require." Great Western, 778 P.2d at 581 n. 4 (quotation omitted). We are thus persuaded that Alaska courts would permit Thomas,

Head to bring its fraudulent conveyance claims in a supplementary proceeding such as the one presented to the district court.

Subject Matter Jurisdiction

We still must satisfy ourselves, however, given the posture of this case, that the district court had federal subject matter jurisdiction over the proceedings involving the Johnson parties, who were not parties to the original action or judgment, but were impleaded by Thomas, Head and joined in the supplementary proceedings. There can be little question that federal courts generally possess the power to protect their judgments by setting aside fraudulent conveyances of the judgment debtor. See Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 u.S. 684, 694-95 (1950) (federal court's power "to protect its jurisdiction from being thwarted by a fraudulent transfer ... applies equally whether it is concerned with executing its judgment or

authorizing an attachment to secure an independent maritime claim"); Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329, 333 (1887). This power derives from the long-recognized principle that a federal court may assert authority over non-federal claims "when necessary to give effect to the court's judgment." Finley v. United States, 490 U.S. 545, 551 (1989) (citing Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934), and Julian v. Central Trust Co., 193 U.S. 93, 112-14 (1904)).[6] In the present case,

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[6]In Local Loan, the Court stated:

> That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved[.]

however, there is no diversity of citizenship between the Johnson parties and Thomas, Head. As such, the Johnson parties challenge the district court's ancillary jurisdiction over them.

In Peacock v. Thomas, 116 S.Ct. 862, 867-69 (1996), the Supreme Court held that, absent an independent basis for federal jurisdiction, a new defendant may not be joined in a supplementary

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292 U.S. at 239 (citations omitted). See also Julian, 193 U.S. at 113 (irrespective of the citizenship of the parties, "the protection and preservation of [federal] jurisdiction ... lie at the very foundation of ancillary jurisdiction" (quotation omitted)); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 23 (1825) (Marshall, C.J.) (a federal court's jurisdiction "is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied"); Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53 (1825) ("The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after the judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction[.]"); id. at 64 ("An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution, are proceedings in the suit[.]").

proceeding to pierce the corporate veil. The Court reasoned that federal district courts do not possess ancillary jurisdiction over such claims where the judgment creditor is attempting to establish the new defendant's liability for the original judgment. Id. at 868-69.[7] Under Alaska law, however, the Johnson parties are indispensable parties to the fraudulent conveyance claims, and Thomas, Head seeks only to disgorge from them, as alleged fraudulent

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[7] Peacock suggested that whether a judgment creditor's post-judgment action is within a federal district court's ancillary enforcement jurisdiction hinges on whether it seeks not merely "to collect a judgment" but also to establish liability: on the part of a third party. See 116 S.Ct. at 868 n. 6 (quotation omitted). The Court expressly declined to address the argument, raised by the United States as amicus curiae, that Thomas's supplementary claims were "intended merely as supplemental bill to preserve and force payment of the ERISA judgment by voiding fraudulent transfers of [the judgment debtor's] assets," on the ground that "neither Thomas nor the courts below characterized this suit that way." Id. The issue left open in Peacock is precisely the issue presented in this case.

transferees, the property Buster wrongfully transferred to them. Because Thomas, Head is not attempting to establish the Johnson parties' liability for the original judgment, we find Peacock inapposite.

In the 1887 decision of Dewey v. West Fairmont Gas Coal Co., the Supreme Court held that federal district courts possess ancillary jurisdiction over a fraudulent conveyance action against the transferee of the judgment debtor's assets. In Dewey, as here, the transferee was not originally a party to the proceeding, and jurisdiction over the transferee was challenged because the latter was a citizen of the same state as the judgment creditor. On appeal, however, the Court rejected that objection on the ground that joinder was necessary to prevent avoidance of the judgment. 123 U.S. at 333; see also Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 F.2d 295, 296-97 (2d

Cir. 1927) (L. Hand, J.). The Supreme Court recently explained Dewey, stating;

> This Court's decision in Dewey ... explicitly rested upon "ancillary" jurisdiction, citing Krippendorf v. Hyde, 110 U.S. 276 (1884), in support of its holding that "[t]he suit in equity was an exercise of jurisdiction ... ancillary to that which it had already acquired in the action at law." 123 U.S. at 333. In Dewey, the new defendant added in the equitable counterclaim was asserted to have been the recipient of a fraudulent conveyance from the insolvent plaintiff, and the counterclaim was brought under a West Virginia statute authorizing suits to set aside such conveyances in assistance of an anticipated judgment or decree against the conveying debtor. Any decree on the counterclaim would presumably have been worthless if the fraudulent conveyance could not have been recaptured.

Finley, 490 U.S. at 551 n. 4.[8]

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[8]In Pennsylvania Railroad Co. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1963), Judge Hastie, citing Dewey, succinctly answered any concern the parties have expressed as to ancillary jurisdiction in the present case:

> It has long been familiar federal practice to entertain an "ancillary" claim without independent jurisdictional basis, if that claims

The Johnson parties urge that Dewey is superseded by Fed. R. Civ. P. 69(a) and is distinguishable in that the transferee therein was joined in the prejudgment stage of the proceedings.[9] We reject both arguments. As to the argument that Rule 69(a) supersedes Dewey, the Federal Rules neither extend nor limit a federal court's subject matter jurisdiction. Fed. R. Civ. P. 82. As to the timing issue, the

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> seeks either to make a principal judgment effective or to make some lawfully required reallocation of the burden imposed by the principal recovery. Such a supplemental proceeding may serve to effectuate a principal judgment ... [and] may achieve full justice by bringing into a suit a third party who should be required to pay the judgment on a claim because of a transfer to him in fraud of creditors. Dewey v. West Fairmont Gas Coal Co., [123 U.S. 329 (1887)].

Id. at 845 (internal citations omitted).

[9]In the present case, some of the transfers were alleged to have been made prior to the underlying judgment and some afterward.

fact that the joinder and some of the transfers took place after judgment is not dispositive of whether the court has jurisdiction to effectuate its judgment by recapturing the judgment debtor's fraudulent conveyances. The principle of Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 187 (1867), remains sound: "Process subsequent to judgment is as essential to jurisdiction as process antecedent to the judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." In this case, the supplementary proceeding to set aside the fraudulent transfers is essential to prevent Buster's efforts to avoid the district court's original judgment. See Peacock, 116 S.Ct. at 869 ('Ancillary enforcement jurisdiction is, at its core, a creature of necessity."). We therefore find Dewey applicable, and hold that the district court properly exercised ancillary jurisdiction

over both Buster and the Johnson parties in Thomas, Head's supplementary proceeding to set aside the alleged fraudulent conveyances.

II

The Preliminary Injunction

Buster and the Johnson parties each challenge the lower court's issuance of the preliminary injunction. Buster contends that the court erred in requiring him to post what amounted to a "mandatory" $125,000 supersedeas bond; the Johnson parties contend that the injunction was an invalid prejudgment attachment. We conclude that neither Buster nor the Johnson parties, having failed to appeal the preliminary injunction, may challenge its issuance on appeal from the entry of default judgment for their failure to obey the district court's order.

In FTC v. American National Cellular, 868 F.2d 315, 317 (9th Cir. 1989), this court held that a party may not, upon appealing a contempt

order, challenge the constitutionality of the underlying restraining order it has violated, unless that order is "transparently invalid" or has been declared unconstitutional in an unrelated proceeding. The "transparently invalid" exception traces from dictum in Walker v. City of Birmingham, 388 U.S. 307, 315 (1967), and, although this circuit has never found the "transparently invalid" exception applicable, Walker suggests there may be times when an injunction is so plainly unconstitutional as to permit it to be challenged after its violation. See In re Establishment Inspection of Hern Iron Works, Inc., 881 F.2d 722, 727 (9th Cir. 1989). Buster and the Johnson parties suggest this is such a case. We disagree.

In its request for a preliminary injunction, Thomas, Head expressly asked the court to consider "whether Buster should be required to pay into the registry of the court the $125,000

that was previously in Buster's counsel's law office trust account.' ER 311 at 7. The court informed the parties that it would "consider ... the question of payment of money into the court registry." ER 313 at 1. The transcript of proceedings from oral argument on the preliminary injunction indicates that counsel for Buster was aware that a requirement to deposit the $125,000 with the registry of the court would be part of the injunction. The district court granted the injunction, including a requirement that Buster and the Johnson parties, on a joint and several basis, deposit $125,000 with the registry of the court. Upon entering the preliminary injunction, the district court found:

> Jack B. Buster's counsel, A. Lee Peterson (sic), was in possession of $125,000 that this court understood was to be used by defendant Buster in order to post a supersedeas bond. Based on evidence presented to this court, there is a substantial likelihood that the $125,000 are proceeds of transferred assets which are the subject of plaintiffs' fraudulent conveyance action and covered by the February 19,

> 1993 Temporary Restraining Order. There is an appreciable risk that defendant Jack Buster or the impleaded defendants will dispose of these funds prior to resolution of plaintiffs' fraudulent conveyance action. If these funds are dissipated, irreparable harm will be incurred by plaintiffs.

SER 334 at 2-3 (emphasis added).

Buster

The record clearly reveals that there is no merit in Buster's contentions that the district court failed to consider the requisite factors for preliminary injunctive relief--i.e., the likelihood of success on the merits and irreparable injury-- and that the district court failed to give Buster notice that the injunction could include the requirement of a $125,000 deposit with the registry of the court. Nor was there merit in Buster's argument that the $125,00 deposit requirement was an inappropriate means of requiring him to post a supersedeas bond. The district court found it substantially probable that the $125,000 was related specifically to

property which was fraudulently conveyed to defraud Thomas, Head; the deposit requirement was not a substitute for a supersedeas bond. Under Alaska law, upon which Buster relies, courts are clearly authorized to enjoin any "act, removal, or disposition" of property done or made "with intent to delay or defraud creditors." Alaska Stat. § 09.40.230. Furthermore, even if the district court erred as alleged by Buster, such a mistake would not render the injunction transparently invalid. Accordingly, we hold that Buster may not challenge the issuance of the preliminary injunction in this appeal from the finding of contempt and entry of default judgment. As the court explained in American National Cellular, Buster should have challenged the injunction "by direct appeal of the order." 868 F.2d at 317.

The Johnson Parties

The Johnson parties raise a distinct challenge to the preliminary injunction. They suggest the district court erred in requiring a deposit of $125,000 under the injunctive relief provisions of Fed. R. Civ. P. 65. They urge that, as to them, the deposit requirement was actually a prejudgment attachment subject to Fed. R. Civ. P. 64. They argue that the district court required the deposit before adjudicating the merits of Thomas, Head's claims or complying with Alaska procedure, which requires plaintiffs to deposit "sufficient sureties" prior to obtaining prejudgment attachments. Alaska R. Civ. P. 89(a). The Johnson parties maintain that these errors render the preliminary injunction transparently invalid.

In view of the court's order and its concern that the $125,000 had been fraudulently conveyed, we reject the Johnson parties' attack on the preliminary injunction. The court heard argument

on the proposed injunction and found that Thomas, Head's fraudulent conveyance claims were likely to succeed. The Johnson parties' claim in no way implicates the court's inherent authority or jurisdiction to enter an order to preserve the possibility of equitable remedies. See Reebock Int'l, Ltd. v. Marnatech Enters., Inc., 970 F.2d 552, 559 (9th Cir. 1992); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989). The $125,000 does not represent a money judgment for damages. The ultimate relief sought, the invalidation of various fraudulent conveyances, is equitable in nature. The injunction merely sought equitably to preserve assets and moneys found to be the product of fraudulent conveyances to the Johnson parties, in order to protect the court's earlier judgment against Buster. In such circumstances, the injunction cannot be characterized as having

"only a frivolous pretense to validity." Walker, 388 U.S. at 315. Accordingly, we find that the Johnson parties may not challenge the issuance of the preliminary injunction in this appeal. American National Cellular, 868 F.2d at 317.

The Default Judgment

When Buster and the Johnson parties failed to comply with the district court's preliminary injunction, Thomas, Head moved for an order to show cause why they should not be held in contempt. The court requested briefing on the motion, but Buster missed the deadline by twelve days and the court refused to consider his brief. The Johnson parties filed a timely brief and argued, as they have argued here, that the preliminary injunction was an invalid prejudgment attachment and, alternatively, that they did not have the money to comply. The claim that they could not comply, however, was unsupported by any

admissible evidence.[10]

On September 28, 1993, the district court rejected the Johnson parties' arguments and granted Thomas, Head's motion for an order to show cause. The court stated:

> Defendants failed to respond in any way to the court's preliminary injunction. No appeal was taken by defendants regarding any aspect of the preliminary injunction. Defendants ignored all directives of the preliminary injunction.
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> Defendant Jack Buster has previously submitted to the court that while the court may order him to post a supersedeas bond, the court cannot force him to actually post the bond. That argument is inapplicable under the present circumstances. The court has entered a preliminary injunction. As part of the preliminary injunction, defendants are directed to pay $125,000 into the court registry. There is nothing in the preliminary injunction regarding the posting of a supersedeas bond. The court may, through its use of civil contempt orders, do what is necessary under the facts of the case to require a party to comply with the

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[10]The Johnson parties's (sic) brief was supported only by an unsigned affidavit simply asserting, without supporting documentation, that they did not have sufficient funds to comply.

directives of a preliminary injunction.

Defendants Janice Sue Buster, et al make two arguments why they did not respond to the court's preliminary injunction. First, defendants argue that the preliminary injunction requires them to pay a final judgment before the case is tried. Second, defendants submit that they cannot comply with the preliminary injunction because they do not have the funds.

Neither argument forms a basis on which defendants can ignore an order of the court. The preliminary injunction was issued as part of plaintiffs' fraudulent conveyance action. The court found, when it issued the preliminary injunction, that funds have fraudulently been transferred or dissipated. To prevent the loss of funds that might be used to satisfy plaintiffs' judgment, defendants were directed to deposit $125,000 into the court registry. Defendants could have appealed the issuance of the preliminary injunction. They did not. Defendants' submission that they cannot comply is inadequate. A mere assertion of inability to comply with a court's order is insufficient. Defendants must introduce evidence supporting their assertion. Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297 (11th Cir. 1991).

No cause having been shown by defendants why they should not be held in contempt for ignoring an order of this court, plaintiffs' motion to show

> cause is granted. As of the date of this order, default is entered in plaintiffs' fraudulent conveyance action as to defendants.... Default will be vacated upon compliance with the court's preliminary injunction.
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> Further, plaintiffs are granted costs to be determined by the clerk of court and reasonable attorneys's fees to be determined by the court upon submission of appropriate documentation.

ER 363 at 3-4. Although the district court indicated that it would vacate default upon compliance with the preliminary injunction, Buster and the Johnson parties neither complied with its terms nor showed cause for their failure to do so. The court entered default judgment on the fraudulent conveyance claims nearly a year later, on August 8, 1994.[11] Buster and the

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[11]The district court did not explicitly label its chosen contempt sanction, but we presume, as the parties do, that the entry of default and award of attorney fees were contempt sanctions for the parties' failure to comply with the directives of the preliminary injunction. Upon the court's entry of default judgment in 1994, the court awarded Thomas, Head attorneys' fees in the amount of $7500 plus costs and interest. ER 436 at 12-13.

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Johnson parties appeal from the entry of default judgment.

Regarding the finding of contempt and entry of default judgment, Buster and the Johnson parties contend that the district court omitted several necessary procedural steps and erroneously combined its contempt determination with its decision to grant Thomas, Head's motion to show cause. They argue that the court merged into one action what should have been a five-step process: (1) deciding whether to grant plaintiffs' motion to show cause; (2) issuing the show cause order; (3) providing a hearing; (4) making a finding of contempt on the basis of affidavits and other evidence; and (5) determining and imposing sanctions. Quoting Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1304 (11th Cir. 1991), they maintain that "[d]ue process requires that the court inform the alleged contemnor of the contemptuous

conduct and provide a hearing in which the alleged contemnor may explain why the court should not make a contempt finding." All of the defendants content that they understood that the motion would result in either a grant or denial of the order to show cause, not a finding of contempt.[12]

The imposition of civil contempt and contempt sanctions is normally reviewed for an abuse of discretion. Reebok Int'l. Ltd. v. McLaughlin, 49 F.3d 1387, 1390 (9th Cir.), cert. denied, 116 S.Ct. 276 (1995). The issue of

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[12]Although Buster did not timely respond to the court's request for opposition to the motion to show cause, he notes that he had previously filed an affidavit with the court stating that he could not comply with the $125,000 deposit requirement, that he objected to the preliminary injunction on the basis that it included a "mandatory" deposit provision, and that he filed a response to the court's minute order requiring a deposit of funds. Buster suggests that this opposition, though not filed in response to the request for opposition to the motion for an order to show cause, indicates that a hearing was warranted.

whether a district court provided an alleged contemnor due process, however, is a legal question subject to de novo review on appeal. See Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492 (9th Cir. 1983); see also Fed. R. Civ. P. 43.

We find that Buster and the Johnson parties had ample notice and an opportunity to respond to the possibility that the court would find them in contempt. The district Court expressly requested briefing in response to Thomas, Head's motion for an order to show cause why Buster and the Johnson parties should not be held in contempt. Buster failed timely to respond to the court's request and, although the Johnson parties filed a brief, they presented no admissible evidence to support their claim that they could not comply with the injunction. Although the district court did not set an evidentiary hearing on the contempt issue, the record reflects that neither Buster nor the

Johnson parties asked for such a hearing in response to Thomas, Head's motion for an order to show cause. Moreover, while the district court's order provided that default would be vacated upon compliance with its preliminary injunction, Buster and the Johnson parties still failed to comply, even in part, throughout the following year, when default judgment was finally entered. Given these facts and the overwhelming evidence supporting Thomas, Head's request,[13] we think it is clear tat the district court's actions did not constitute a denial of due process. In Commodity Futures Trading Comm'n v. Premex, Inc., 655 F.2d 779, 782 n. 2 (7th Cir. 1981), the court rejected the argument that contempt should be set aside pending a full evidentiary hearing stating:

> [T]he refusal to grant a full evidentiary hearing did not constitute

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[13]Our review of the record evidence, see note 9, supra, requires that we reject the Johnson parties's (sic) argument that contempt was inappropriate because she could not comply with the injunction.

> a due process denial where the documentary evidence presented by the CFTC was more than sufficient to establish the contemptuous conduct. In addition, defendants received the CFTC's motion and supporting papers in ample time to prepare for a show cause hearing. They also failed to demand such a hearing at that time and did not present any arguments which created any material issue of fact. Unlike the situation in United States v. Alter, 482 F.2d 1016, 1023-24 (9th Cir. 19730, Premex was not deprived of a meaningful opportunity to present its defense. Defendants merely failed to take advantage of the chance they were afforded in the court below. This failure in no way negates the legal proof of the contemptuous conduct tendered by the CFTC.

Accordingly, we affirm the finding of contempt, the entry of default, the subsequent entry of default judgment, and the award of attorney fees against Buster and the Johnson parties.

III

Westwood's Rule 60(b)(4) Motion

Westwood separately challenges the entry of default judgment against Buster and the Johnson parties as void for lack of jurisdiction as it

affects Westwood's operations and property. Westwood was not a defendant at the time of the August 8, 1994 default judgment, although Westwood had notice of the proceedings by virtue of the notice to Buster, Westwood's general partner. See Alaska Stat. §32.05.070. The default judgment set aside Buster's transfer of certain interests in Westwood, directed Westwood to "pay to the plaintiffs all present and future shares of all distributions, credits, draws, or payments which would have been paid to Jack Buster for his general and/or limited interest in Westwood" until the underlying judgment was satisfied, and authorized the sale of Buster's limited partnership interest in Westwood at an auction at which Thomas, Head was permitted to bid. ER 436 at 9-10.[14]

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[14]On May 9, 1995, the magistrate judge appointed a receiver to assist Thomas, Head in the recovery of the defendants' interests in Westwood. The order granted the receiver access to Westwood's financial records and directed him to freeze Westwood's bank accounts and

On June 1, 1995, Thomas, Head issued a notice of public sale of Buster's limited partnership interest in Westwood. On June 6, Westwood filed a motion under Fed. R. Civ. P. 60(b)(4) for relief from the default judgment entered against Buster and the Johnson parties.[15]

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distribution of proceeds from the collection of payment on promissory notes to Westwood until the court could determine what portion of the account funds and the note payments belonged to Buster and the Johnson parties. Westwood then sought leave to intervene. In its motion to intervene, Westwood stated that "[p]rior to the issuance of [the May 9] Order, Westwood Acres, as a limited partnership entity, was in no way affected by this lawsuit." ER 546, Memorandum in Support of Motion to Intervene, at 2. Westwood sought to vacate the May 9 order. On May 30, the magistrate judge granted Westwood's motion to intervene. On June 7, the magistrate judge found that the May 9 order exceeded the district court's authority and vacated that portion of the order which authorized the receiver to freeze Westwood's bank accounts and the distribution of promissory note payments. Although Westwood criticizes the May 9 order in its opening brief on appeal, it did not appeal either the May 9 or the June 7 order. This issue is therefore not before us on appeal.

[15]Fed. R. Civ. P. 60(b)(4) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

Westwood argued that the default judgment, to the extent it affected its property, was void for lack of jurisdiction because it was not a party to the proceeding. Further, Westwood argued that under Alaska law a judgment creditor is limited to the rights of an assignee of the judgment debtor's interests, see Alaska Stat. § 32.11.340, and that the default judgment violated due process by depriving Westwood of its property interest in Buster's limited partnership interest under the partnership agreement. Specifically, Westwood's partnership agreement, which governs the rights of assignees under §32.11.340, gives the general partner the right to veto the sale of any limited partnership interest, although there is no limitation on the assignment of the right to distributions. On June 13, the district court rejected Westwood's Rule 60(b)(4) motion because

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judgment, order, or proceeding for the following reasons ... (4) the judgment is void; ...."

the default judgment had only a limited effect on Westwood and because Buster effectively controlled Westwood.[16] Westwood appeals the denial of the Rule 60(b)(4) motion.

We find that the district court properly denied Westwood's Rule 60(b)(4) motion.[17] As we have found, the district court had supplementary jurisdiction over Buster's limited partnership interest and the other interests in Westwood that Buster had previously conveyed. Those interests were subject to the court's jurisdiction because

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[16]On June 20, 1995, Buster's limited partnership interest was sold at an auction to Thomas, Head for what Westwood contends was less than its fair market value.

[17]"A judgment is not void merely because it is erroneous. It is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law." In re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir. 1985). A party has standing to make a Rule 60(b)(4) motion on due process grounds only if its property rights were adversely affected by the challenged judgment. Id. at 1445.

Buster and the transferees of those interests were parties to the proceeding at that time. The default judgment did not deprive Westwood of property without due process of law. First, Westwood had no property right as to the distributions to which Buster would otherwise have been entitled. Under Alaska law, the district court was entitled to require Westwood to pay the distributions to which Buster was entitled to Thomas, Head as judgment creditors who assumed the role of assignees of his partnership interests. See Alaska Stat. § 32.11.340. Second, to the extent that the default judgment had an incidental effect on Westwood's property right in controlling the sale of Buster's limited partnership interests under the partnership agreement, that right was not violated without due process of law. Westwood had notice of the proceedings through its general partner and could have intervened earlier in

order to protect its interests. Furthermore, th specific asserted property interest--i.e., th right of the general partner to consent to th sale--was fully protected by the genera partner's involvement in the proceedings. Unde these circumstances, we find no deprivation o Westwood's property rights without due process.[18]

For the foregoing reasons, the default judgment against Buster and the Johnson parties

---

[18]Westwood was not an indispensable party to the proceedings. Westwood had not claimed an interest in Buster's limited partnership interest at the time of the default judgment and the district court was able to craft appropriate and meaningful relief in the absence of Westwood which, as we have discussed, did not prejudice Westwood's property rights. See Fed. R. Civ. P. 19. Thus, we find that the default judgment against Buster and the Johnson parties is not void for lack of jurisdiction for failure to join Westwood as an indispensable party. Furthermore, even if Westwood had been an indispensable party to the proceedings, that would not necessarily be a jurisdictional defect that would make the default judgment amenable to attack by way of a Rule 60(b)(4) motion. See Kansas City S. Ry. Co. v. Great Lakes Carbon Corp., 624 F.2d 822, 824-25 & n. 2 (8th Cir.) (en banc), cert. denied, 449 U.S. 955 (1980).

and the denial of Westwood's 60(b)(4) motion is AFFIRMED.[19]

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[19]Westwood filed its notice of appeal from the denial of its Rule 60(b)(4) motion on June 16, 1995. Prior to that, on May 30, Westwood filed a claim for damages against Thomas, Head. On June 19, Thomas, Head filed a response to Westwood's counterclaims and filed its own counterclaim against Westwood, requesting the appointment of a receiver for Westwood. On September 14, 1995, the magistrate judge appointed a receiver for Westwood--the same receiver as appointed in the May 9 order that was subsequently vacated in part, see note 14, supra--as requested by Thomas, Head. As in the partially vacated May 9 order, the receiver was empowered to freeze Westwood's assets and distributions until the court determined whether they belonged to Buster and the Johnson parties.

On December 19, 1995, in its reply brief to this court on appeal from the denial of its Rule 60(b)(4) motion, Westwood complained that the district court's September 14 order exceeded the district court's jurisdiction pending the appeal from the denial of its Rule 60(b)(4) motion. Although Westwood was entitled to appeal the September 14 order appointing a receiver under 28 U.S.C. § 1292(a)(2), it did not do so.

Ordinarily this court lacks jurisdiction to consider an appeal from a district court order unless a notice of appeal is filed as to that order. Fed. R. App. P. 4(a)(1); Brower v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978). Because Westwood had filed a prior notice of appeal from the denial of its Rule 60(b)(4) motion, Westwood suggests that its

failure to file a notice of appeal from the subsequent order does not deprive this court of appellate jurisdiction over the subsequent order. In Miranda v. Southern Pac. Transp. Co., 701 F.2d 516 (9th Cir. 1983), this court exercised appellate jurisdiction to determine whether the district court had jurisdiction to enter an order, after the filing of a notice of appeal as to a prior order, despite the lack of a timely notice of appeal from the subsequent order. Id. at 519. Miranda also recognized, however, that this court would not have jurisdiction to consider the merits of the subsequent order if the district court had possessed jurisdiction to enter that order. Id. at 519 n. 6. Thus, under Miranda, we have jurisdiction to determine whether the magistrate judge had jurisdiction to enter the September 14 order, which was entered after Westwood's notice of appeal from the denial of its Rule 60(b)(4) motion, but not to determine whether the September 14 order was correct on the merits.

"The general rule is that an appeal to the circuit court deprives a district court of jurisdiction as to any matters involved in the appeal." Hoffman v. Beer Drivers & Salesmen's Local Union No. 888, 536 F.2d 1268, 1276 (9th Cir. 1976). This rule does not apply if the district court has a continuing duty to maintain the status quo pending appeal and if new facts and circumstances arise which require further action to supervise the case and to maintain the status quo. Id.; see also Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1480 n. 14 (9th Cir. 1994).

The magistrate judge found that Buster, as the general partner of Westwood, had concealed

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from Thomas, Head certain Westwood distributions; that Thomas, Head agreed not to oppose legitimate distributions to Westwood's limited partners unrelated to Buster; and that Thomas, Head was at risk of losing monies to which it was entitled as a result of Westwood's unsupervised distributions. These factual findings, which we discern no basis on the present record to find in error, suggest that the magistrate judge had a duty to rule on Thomas, Head's counterclaim in order to prevent the depletion of Westwood's assets. Thus, we find that the district court properly exercised its jurisdiction notwithstanding Westwood's prior notice of appeal. Accordingly, Westwood was required to file a separate notice of appeal in order to challenge the merits of the September 14 order, as the parties did in Meinhold, 34 F.3d at 1473, and Hoffman, 536 F. 2d at 1271.

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431 W. 7th Ave., Suite 207
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Lawyers for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD, Plaintiffs, v. JACK B. BUSTER, TERRY D. PARKS and NORTHERN FINANCIAL, Defendants.	)	
THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD, Plaintiffs, v. JACK B. BUSTER, JANICE SUE BUSTER, a/k/a JANICE SUE JOHNSON, HORIZONS WEST, INC., and Oregon Corporation, DAVID	)	Case No. A89-071 CV (JAV)

J. BERG, MARJORIE A. BERG, CARL L. CASEY, SCORPIO, INC., and Alaska Corporation, WESTERN INVESTMENT TRUST, and SUSAN BENEDICT, TRUSTEE of the WESTERN INVESTMENT TRUST,

Defendants.

DEFAULT JUDGMENT

By order of this court, daced September 28, 1993, default has been entered against defendants Jack B. Buster, Janice Sue Buster, a/k/a Janice Sue Johnson, Horizons West, Inc., Scorpio, Inc., Western Investment Trust and Susan Benedict, Trustee of the Western Investment Trust. Plaintiffs have requested judgment by default against said defendants, and file an affidavit that said defendants are not infants or incompetents, nor in the military service of the United States.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the asset conveyances made by Jack B. Buster to Janice Sue Johnson a/k/a Janice Sue Buster since January 1, 1991 including, but not limited

to the conveyances set forth in the September 23, Separate Property Agreement, a copy of which is attached hereto as Exhibit A, were fraudulent conveyances as defined by AS 34.40.010, having been made between Jack B (sic) Buster and Janice Sue Buster for inadequate consideration and with the intent to hinder, delay or defraud plaintiffs and other creditors of Jack B. Buster of their lawful suits, damages, forfeitures, debts or demands and are therefore void as against plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREES that among the asset conveyances in the September 23, 1993 Separate Property Agreement that are now void as against plaintiffs, is the conveyance of Scorpio, Inc.'s limited partnership interest in Kavik Valdez, a limited partnership, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the January 4, 1992 assignment, a copy of which is attached hereto as Exhibit A1, by Jack

B. Buster to Janice Sue Johnson a/k/a Janice Sue Buster, of Mr. Buster's right to receive all capital accounts and monies due, or to become due or owed in the form of debt owed by Kavik Valdez to Jack B. Buster, was a fraudulent conveyance as defined by AS 34.40.010, having been made between Jack B. Buster and Janice Sue Johnson for inadequate consideration and with the intent to hinder, delay or defraud plaintiffs and other creditors of Jack B. Buster in their lawful suits, damages, forfeitures, debts or demands and is therefore void as against plaintiffs, and

IT IS FURTHER ORDERED (sic) ADJUDGED, AND DECREED that the September 13, 1991 assignment, a copy of which is attached hereto as Exhibit B, by Jack B. Buster to Janice Sue Johnson a/k/a Janice Sue Buster, of Mr. Buster's right to receive all capital accounts and monies due, or to become due or owed in the form of debt owed by Scorpio, Inc. to Jack b. (sic) Buster, was a

fraudulent conveyance as defined by AS 34.40.010, having been made between Jack B. Buster and Janice Sue Johnson for inadequate consideration and with the intent to hinder, delay or defraud plaintiffs and other creditors of Jack B. Buster of their lawful suits, damages, forfeitures, debts or demands and is therefore void as against plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the January 4, 1992 assignment, a copy of which is attached hereto as Exhibit C, by Jack B. Buster to Janice Sue Johnson a/k/a Janice Sue Buster, of Mr. Buster's right to receive all capital accounts and monies due, owed or to become due or owed in the form of debt owed by Westwood Acres to Jack B. Buster, was a fraudulent conveyance as defined by AS 34.40.010, having been made between Jack B. Buster and Janice Sue Johnson for inadequate consideration and with the intent to hinder, delay or defraud

plaintiffs and other creditors of Jack B. Buster in their lawful suits, damages, forfeitures, debts or demands and is therefore void as against plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any monies owed by Westwood Acres to defendants should be turned over by Westwood Acres to the registry of this court, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the conveyance evidenced by that certain Quit-Claim Deed executed by Jack B. Buster on December 20, 1991 and recorded on December 26, 1991 at Book 0670, Page 0789, Records of the Palmer Recording District, Third Judicial District, State of Alaska, purporting to convey real property located with in the BODENBERG CREEK SUBDIVISION, as described in Exhibit D hereto, to Scorpio, Inc., was a fraudulent conveyance as defined by AS 34.40.010, having been made between Jack B. Buster and Janice Sue Johnson for

inadequate consideration and with the intent to hinder, delay or defraud plaintiffs and other creditors of Jack B. Buster in their lawful suits, damages, forfeitures, debts or demands and is therefore void as against plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the BODENBERG CREEK SUBDIVISION property, as described in Exhibit D hereto, is subject to the lien of the judgment entered in favor of plaintiffs in Thomas, Head & Greisen Employees' Trust, et al. v. Jack B. Buster, et al., Case No. A89-071 CI (JAV), in the United States District Court for the District of Alaska, which judgment was recorded on August 21, 1992, at Book 690, Page 791 of the Palmer Recording District, and that the lien of the judgment attaches as of the date and time of the August 21, 1992 recording of the judgment, and

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the August 12, 1992 assignment, a copy of

which is attached hereto as Exhibit E, by Scorpio, inc. to Horizons West, Inc. of the Deed of Trust and Deed of Trust Note secured by property known as ATS No. 674, as described in Exhibit E, was a fraudulent conveyance as defined by AS 34.40.010, having been made between Scorpio, Inc. and Horizons West, Inc. for inadequate consideration and with the intent to hinder, delay or defraud plaintiffs and other creditors of Jack B. Buster of their lawful suits, damages, forfeitures, debts or demands and is therefore void as against plaintiffs, and

IT IS FURTHER ORDERED (sic) ADJUDGED, AND DECREED that the Deed of Trust and Deed of Trust Note described in Exhibit E hereto, is subject to the lien of the judgment entered in favor of plaintiffs in Thomas, Head & Greisen Employees' Trust, et al. v. Jack B. Buster, et al., Case No. A89-071 CI (JAV), in the United States District Court for the District of Alaska, which judgment

was recorded on August 24, 1992, in Book 117, Page 914 in the Valdez Recording District, and that the lien of the judgment attaches as of the date and time of the August 24, 1992 recording of the judgment, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the conveyance evidenced by that certain Quit-Claim Deed, a copy of which is attached as Exhibit F, executed by Scorpio, Inc. on August 24, 1992 and recorded on August 27, 1992 at Book 404, Page 606, Records of the Kenai Recording District, Third Judicial District, State of Alaska, purporting to convey Lots Ten (10) through Eighteen (18), Block One (1), and Lots Eleven (11) through Fifteen (15), Block Three (3) all within HIGHLAND SUBDIVISION, according to Plat K-1542, being within the Kenai Recording District, Third Judicial District, State of Alaska, to Horizons West, Inc., was a fraudulent conveyance as defined by AS 34.40.010, having

been made between Scorpio, Inc. and Horizons West, Inc. for inadequate consideration and with the intent to hinder, delay or defraud plaintiffs and other creditors of Jack B. Buster of their lawful suits, damages, forfeitures, debts or demands and is therefore void as against plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the real property described in Exhibit F hereto is subject to the lien of the judgment entered in favor of plaintiff in Thomas, Head & Greisen Employees' Trust, et al. v. Jack B. Buster, et al., Case No. A89-071 CI (JAV), in the United States District Court for the District of Alaska, which judgment was recorded on August 21, 1992, Book 404, Page 267 in the Kenai Recording District, and that the lien of the judgment attaches as of the date and time of the August 21, 1992 recording of the judgment, and

IT IS HEREBY ORDERED, ADJUDGED, AND DECRE
that the conveyance evidenced by that certa
Quit-Claim Deed executed by Scorpio, Inc.
August 24, 1992 and recorded on August 27, 19
at Book 404, Page 605, Records of the Ken
Recording District, Third Judicial Distric
State of Alaska, purporting to convey Tract Thr
(3), BIG SKY SUBDIVISION, according to t
official plat thereof recorded as Plat No. 76-5
in the Kenai Recording District, Third Judici
District, State of Alaska, as described
Exhibit G hereto, to Horizons West, Inc., was
fraudulent conveyance as defined by AS 34.40.01
having been made between Scorpio, Inc. a
Horizons West, Inc. for inadequate considerati
and with the intent to hinder, delay or defra
plaintiffs and other creditors of Jack B. Bust
of their lawful suits, damages, forfeiture
debts or demands and is therefore void as again
plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Big Sky Subdivision property described in Exhibit G hereto is subject to the lien of the judgment entered in favor of plaintiffs in Thomas, Head & Greisen Employees' Trust, et al. v. Jack B. Buster, et al., Case No. A89-071 CI (JAV), in the United States District Court for the District of Alaska, which judgment was recorded on August 21, 1992, Book 404, Page 267 in the Kenai Recording District, and that the lien of the judgment attaches as of the date and time of the August 21, 1992 recording of the judgment, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the August 24, 1992 assignment, a copy of which is attached hereto as Exhibit H, by Scorpio, Inc. to Horizons West, Inc., of the Deed of Trust and Deed of Trust Note which was secured by the property described as Lot Sixteen (16), Block Five (5), ROOSEVELT PARK SUBDIVISION,

according to Plat No. P-57A, being within t Anchorage Recording District, Third Judici District, State of Alaska, was a fraudule conveyance as defined by AS 34.40.010, havi been made between Scorpio, Inc. and Horizo West, Inc. for inadequate consideration and wi the intent to hinder, delay or defraud plaintif and other creditors of Jack B. Buster, of the lawful suits, damages, forfeitures, debts demands and is therefore void as again plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECRE that the Roosevelt Park Subdivision Deed of Tru and Deed of Trust Note are subject to the lien the judgment entered in favor of plaintiffs Thomas, Head & Greisen Employees' Trust, et a v. Jack B. Buster, et al., Case No. A89-071 (JAV), in the United States District Court f the District of Alaska, which judgment w recorded on August 21, 1992, Book 2307, Page 2

in the Anchorage Recording District, and that the lien of the judgment attaches as of the date and time of the August 21, 1992 recording of the judgment, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the January 3, 1991 assignment, a copy of which is attached hereto as Exhibit I, by Jack B. Buster to Scorpio, Inc. of Jack B. Buster's limited partnership interest in Westwood Acres, was a fraudulent conveyance as defined by AS 34.40.010, having been made between Jack B. Buster and Scorpio, Inc. for inadequate consideration and with the intent to hinder, delay or defraud plaintiffs and other creditors of Jack B. Buster of their lawful suits, damages, forfeitures, debts or demands and is therefore void as against plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the January 4, 1992 assignment, a copy of which is attached hereto as Exhibit J, by

Scorpio, Inc. to Horizons West, Inc. of Scorpi
Inc.'s limited partnership interest in Westwo
Acres, an Alaska Limited Partnership, was
fraudulent conveyance as defined by AS 34.40.01
having been made between Scorpio, Inc. a
Horizons West, Inc. for inadequate considerati
and with the intent to hinder, delay, or defra
plaintiffs and other creditors of Jack B. Buste
of their lawful suits, damages, forfeitures
debts or demands and is therefore void as agains
plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECRE
that Jack Buster's general and/or limite
partnership interest in Westwood Acres be and th
same hereby is charged with payment of th
judgment in Thomas, Head & Greisen's (sic
Employees Trust, et al. v. Jack B. Buster, e
al., Case No. A89-071 Civil (JAV). Westwo
Acres shall pay to the plaintiffs all present a
future shares of and all distributions, credits

draws, or payments which would have been paid to jack Buster for his general and/or limited interest in Westwood Acres, until the judgment in Case No. A89-071 Civil, including interest, costs and attorneys' fees, is satisfied in full, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant Buster's limited partnership interest in Westwood Acres may be sold in the manner set forth in AS 09.35.100-170 in the practice of this court. Plaintiffs may become the purchaser of Buster's limited partnership interest in Westwood Acres. Plaintiffs have the right to make an offset bid, without cash, at the time of the said sale, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the transfer of the stock of Scorpio, Inc. to Janice Sue Buster, Horizons West, Inc. and/or Susan Benedict, Trustee, and the Western Investment Trust were fraudulent conveyances as defined by AS 34.40.010, having been made by Jack

B. Buster, Janice Sue Buster, Horizons West, Inc and/or Susan Benedict as trustee for the Wester Investment Trust for inadequate consideration an with the intent to hinder, delay or defrau plaintiffs and other creditors of Jack B. Buste of their suits, damages, forfeitures, debts o demands and are therefore void as agains plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREE that the share certificates of Scorpio, Inc shall be immediately delivered to this court. I the share certificates are not received by thi court within ten (10) days of the issuance o this judgment, the United States Marshal i authorized and directed to seize and deliver th share certificates to this court, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREE that the conveyance evidenced by that certai Quit-Claim Deed executed by Jack B. Buster o December 20, 1991 and recorded on December 23

1991 at Book 2223, Page 809, Records of the Anchorage Recording District, Third Judicial District, State of Alaska, purporting to convey Lot Twenty-seven (27), WOODSIDE EAST Unit No. 2, according to Plat No. 73-101, being within the Anchorage Recording District, Third Judicial District, State of Alaska, as described in Exhibit K hereto, to Scorpio, Inc., was a fraudulent conveyance as defined by As (sic) 34.40.010, having been made between Jack B. Buster and Scorpio, Inc. for inadequate consideration and with the intent to hinder, delay, or defraud plaintiffs and other creditors of Jack B. Buster of their lawful suits, damages, forfeitures, debts or demands and is therefore void as against plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Lot Twenty-seven (27) WOODSIDE EAST Unit No. 2, according to Plat No. 73-101, being within the Anchorage Recording District, Third Judicial

District, State of Alaska, is subject to the lie of the default judgment entered in favor o plaintiffs in Thomas, Head & Greisen Employees Trust, et al. v. Jack B. Buster, et al., Case No A89-071 CI (JAV), in the United States Distric Court for the District of Alaska, which judgmen was recorded on August 21, 1992, Book 2307, Pag 242 of the Anchorage Recording District, and tha the lien of the judgment attaches as of the dat and time of the August 21, 1992 recording of th judgment, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREE that defendants shall within ten (10) days of th issuance of this judgment, turn over to th registry of this court the proceeds of any asse conveyances or transfers covered by thi judgment, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREE that the August 4, 1993 Preliminary Injunctio shall remain in effect until further order o

this court, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiffs are entitled to execute on the assets covered by this judgment and have the assets applied toward the satisfaction of plaintiffs' judgment in Thomas, Head & Greisen Employees' Trust, et al. v. Jack B. Buster, et al., Case No. A89-071 Civil (JAV), and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that if the voiding of the transfers covered by this judgment is inadequate to compensate plaintiffs may request further proceedings necessary to establish the amount of recoverable damages, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiffs recover from defendants Jack B. Buster, Janice Sue Buster a/k/a Janice Sue Johnson, Horizons West, Inc., Scorpio, Inc., Western Investment Trust and Susan Benedict, Trustee of the Western Investment Trust,

attorneys' fees in the amount of $7500.00, and costs in the amount of $536.20*, for a total of $8,036.20*, together with interest on said total at the rate of 10.5% pe annum from the date of this judgment until paid in full, and

LET EXECUTION ISSUE THEREFOR.

DATED: August 8, 1994 JAMES A. VON DER HEYDT
James A. von der Heydt
Judge of the U.S. District Court

*REDISTRIBUTED 8/24/94

No. 96-1013

Supreme Court, U.S.
FILED
FEB 21 1997

In The

Supreme Court of the United States

October Term, 1996

JACK B. BUSTER; JANICE SUE JOHNSON; HORIZONS WEST, INC.; SCORPIO, INC.; WESTERN INVESTMENT TRUST; SUSAN BENDICT, Trustee of Western Investment Trust; and WESTWOOD ACRES, an Alaskan Limited Partnership,

Petitioners,

vs.

THOMAS, HEAD & GREISEN EMPLOYEES TRUST; RONALD E. GREISEN and HENRY P. HEAD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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34 pp

QUESTIONS PRESENTED

1. Whether the decision below is consistent with Alaska Supreme Court decisions that implicitly and expressly authorize judgment creditors to maintain supplementary fraudulent conveyance proceedings.

2. Whether the decision below conflicts with the decision of this Court in *Peacock v. Thomas*, __ U.S. __, 116 S. Ct. 862 (1996).

3. Whether this Court should accept certiorari to reconsider the factual determinations made below.

4. Whether this Court should accept certiorari to consider issues involving principles that are only important to the parties.

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Appendix B — Opinion of the Supreme Court of the State of Alaska in *Denali Federal Credit Union, et al. v. Susanne Lange* Dated October 17, 1996 ..... 9a

STATEMENT OF THE CASE

This case stems from a supplementary proceeding to set aside fraudulent conveyances. The original lawsuit was initiated on March 7, 1989. Respondents Thomas, Head & Greisen Employees Trust, Ronald E. Greisen and Henry P. Head brought suit against Jack B. Buster, Terry D. Parks and Northern Financial. After a bench trial the district court entered findings of fact and conclusions of law in favor of the Thomas, Head & Greisen Employees Trust, Ronald E. Greisen and Henry P. Head (hereinafter "the Trust"). The district court concluded the Trust was an employee trust for Thomas, Head & Greisen, a professional corporation, and was organized and operated pursuant to ERISA. The district court also concluded petitioners Buster *et al.* were fiduciaries under ERISA; petitioners breached their fiduciary duties to the Trust; and petitioners were liable for damages suffered by the Trust. On August 17, 1992, the district court entered final judgment awarding the Trust $142,745.71 plus costs, attorney fees, and post judgment costs. The findings of fact and conclusions of law of the district court were affirmed by the Ninth Circuit Court of Appeals. *See Thomas, Head & Greisen Employees Trust v. Buster,* 24 F.3d 1114 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 935 (1995).

Petitioner Jack B. Buster (hereinafter "Buster"), in concert with the defendants to the supplementary proceeding, committed a long running series of acts calculated to frustrate the efforts of the Trust to collect on the judgment. This series of acts included both prejudgment and post-judgment transfers of Buster's assets. The transfers were effectuated by Buster. These acts resulted in a fraudulent conveyance action being filed against Buster and the other defendants to the supplementary proceeding. This fraudulent conveyance action is the subject of this proceeding.

In the supplementary fraudulent conveyance proceeding, (hereinafter "Supplementary Proceeding") the district court on August 4, 1983 granted the Trust's request for a preliminary injunction. (RA. 1a.)[1] Specifically, the district court determined there was an appreciable risk that Buster, or the other defendants to the Supplementary Proceeding would cause additional transfers to be made or would dispose of assets which the Trust alleged were fraudulently conveyed by Buster, or the other impleaded defendants. (RA. 2a.) The preliminary injunction froze certain assets and required that Buster and the other defendants deposit $125,000 into the court registry. The $125,000 was, at one time, in the possession of Buster's attorney. The district court determined there was a substantial likelihood that the $125,000 were the proceeds of fraudulently conveyed assets. (RA. 3a.) Neither Buster nor the defendants to the Supplementary Proceeding appealed the preliminary injunction.

When Buster and the defendants to the Supplementary Proceeding failed to deposit the $125,000 in the registry of the court, or show cause for their failure to do so, the district court held them in contempt, and declared them in default. (A. 3.) Approximately one year after the entry of the district court's preliminary injunction, and after Buster and the defendants to the Supplementary Proceeding failed to cure the default, the district court entered default judgment against Buster and the defendants to the Supplementary Proceeding. (B. 1.)

The default judgment set aside numerous asset transfers, including the transfer of Buster's limited partnership interest in Westwood Acres. Buster is the general partner of Westwood Acres. The default judgment also directed Westwood Acres to

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1. All references to the appendix to Respondents' Brief in Opposition will be identified by "RA" and the page number. All other references are to the appendix to Petitioners' Petition for Writ of Certiorari.

pay to the Trust all present and future shares and all distributions, credits, draws or payments that would have been paid to Buster until the judgment was satisfied. Although Westwood Acres had notice of the proceedings through its general partner Buster, Westwood Acres did not move to intervene until May 18, 1995. Westwood Acres then filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(4), on June 6, 1995.

During the time period in which Westwood Acres was silent, Buster diligently fought the Trust's efforts to obtain discovery regarding the distributions from Westwood Acres. Moreover, Buster, in his capacity as general partner of Westwood Acres, was covertly making distributions which violated the terms of the default judgment. It was only after the Trust learned of the unauthorized distributions and took steps to recover the distributions that Westwood Acres moved to intervene.[2] The district court denied Westwood Acres' Rule 60(b)(4) motion. (A. 5.)

SUMMARY OF ARGUMENT

None of the special and important reasons which may warrant a grant of a writ of certiorari exist in this case. In upholding the district court's decision to exercise jurisdiction over the Supplementary Proceeding, the Ninth Circuit Court of Appeals relied on two Alaska Supreme Court decisions in which the court interprets Alaska Rule of Civil Procedure 69. Further, after the Ninth Circuit Court of Appeals issued its opinion in this matter, the Alaska Supreme Court issued a decision that is

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2. The district court entered contempt sanctions against Buster and his former wife, Janice Sue Buster as a result of the unauthorized distributions and the subsequent dissipation of these funds. These sanctions are currently the subject of another appeal to the Ninth Circuit Court of Appeals.

consistent with the position adopted by the Ninth Circuit Court of Appeals. Accordingly, there is no conflict with the decisions of the Alaska Supreme Court.

In upholding the district court's exercise of subject matter jurisdiction, the Ninth Circuit Court of Appeals did not render a decision which is in conflict with *Peacock v. Thomas*, __ U.S. __, 116 S. Ct. 862 (1996). In *Peacock*, this Court reasoned that federal district courts do not possess ancillary jurisdiction over claims where the judgment creditor is attempting to establish a new defendant's liability for the original judgment. *Peacock*, __ U.S. at __, 116 S. Ct. at 868-69. This Court declined to consider the issues present in this case. 116 S. Ct. at 868 note 6.

Moreover, this Court in *Peacock*, reiterated its approval of the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of a federal judgment. Thus, *Peacock* is actually consistent with the opinion of the Ninth Circuit Court of Appeals in this matter.

Finally, the remaining issues were settled predominantly by factual determinations made by the district court. The Ninth Circuit Court of Appeals affirmed the factual determinations. The Ninth Circuit Court of Appeals was not required to construe or interpret matters of law in a manner that is in conflict with the decisions of this or other circuit courts. Moreover, the issues raised by Petitioners do not involve principles the settlement of which is of importance to the public as distinguished from the parties. In short, this matter does not merit discretionary review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THE ALASKA SUPREME COURT.

Only very special cases merit this Court's discretionary review on writ of certiorari. Sup. Ct. R. 10. This dispute is not a special case. The court below correctly determined all questions of state law. Earlier this century, this Court stated, "We had occasion to point out the importance to the orderly judicial administration of state laws in the federal courts that questions of state law required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review." *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944). Further, this Court has frequently deferred to the views of the courts of appeals on issues of local law as being those of an expert tribunal as to the laws of the states within their circuits. *Bunter v. United States,* 440 U.S. 48, 58 (1979).

In affirming the district court's exercise of jurisdiction over the Supplementary Proceeding, the Ninth Circuit Court of Appeals relied on two Alaska Supreme Court decisions which upheld a trial court's exercise of jurisdiction over supplementary proceedings which were not expressly authorized by Alaska Rule of Civil Procedure 69. In *Keltner v. Curtis,* 695 P.2d 1076 (Alaska 1985), a judgment creditor sought to execute on property within the judgment debtor's possession. Third parties filed claims to the property under Alaska Statute § 09.35.130. An evidentiary hearing was held by the trial court to resolve the ownership dispute. The Alaska Supreme Court upheld the lower court's jurisdiction, reasoning that, although A.S. § 09.35.130

did not grant the court authority to determine title to the property, it had the inherent power to do so because the ownership determination was "reasonably necessary to the fair administration of justice." *Id.* 1079 n. 4.

Similarly, in *Great Western Savings Bank v. George W. Easley Co.*, 778 P.2d 569 (Alaska 1989), the trial court entered an order subordinating a construction lenders deed of trust to a general contractors mechanic's lien. On appeal, the Alaska Supreme Court ruled that because it was affirming a money judgment against the lender, "the order of subordination can be viewed as an order in aid of collection of the judgment which is within the inherent power of the court." *Id.* at 581. The Alaska Supreme Court states, "[a] court of equity has power to entertain an action which has for its purpose the enforcement of a judgment in order that complete justice may be done to the parities in interest as to the exigencies of the case or the interests of justice may require." *Id.* at 581 n. 12.

The Ninth Circuit Court of Appeals was persuaded the Alaska Supreme Court would permit the Trust to bring its fraudulent conveyance claims in a Supplementary Proceeding. This determination merits no review, particularly in view of the fact that this Court ordinarily defers to the views of the courts of appeals on issues of local law as being those of an expert tribunal on the laws of the state within their circuit. *Bunter*, 440 U.S. at 57-58. Moreover, the Alaska Supreme Court has recently issued an opinion that is consistent with the opinion of the Ninth Circuit Court of Appeals.

In *Denali Fed. Credit Union v. Lange*, No. 4413 (Alaska Oct. 17, 1996).[3] A judgment creditor moved for a writ of

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3. A copy of this slip opinion is attached in the appendix for the Court's convenience.

execution on a judgment against two properties which a judgment debtor had conveyed to his wife. *Id.* at 3. Judgment debtor's wife moved to intervene and requested a trial on the question of whether judgment debtor had any interest in the property. *Id.* Judgment creditor alleged the conveyance of the properties was fraudulent. *Id.* The trial court denied judgment creditor's motion for a writ of execution without conducting an evidentiary hearing on the fraudulent conveyance issue. *Id.* The Alaska Supreme Court held the trial court should have resolved the fraudulent conveyance issue before the trial court ruled on judgment creditor's motion for a writ of execution. *Id.* at 5. The Alaska Supreme Court remanded the case to the trial court for trial of the fraudulent conveyance issue. *Id.* The *Lange* decision is consistent with the Ninth Circuit Court of Appeal's determination in this case that the supplementary fraudulent conveyance proceeding is authorized under Alaska law.

II.

THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioners assert that this Court's opinion in *Peacock v. Thomas*, __ U.S. __, 116 S. Ct. 862 (1996) is controlling. However, this Court simply held in *Peacock* that absent an independent basis for federal jurisdiction, a new defendant may not be joined in a supplementary proceeding to pierce the corporate veil. *Peacock*, 116 S. Ct. at 867-69. This Court reasoned that federal district courts do not possess ancillary jurisdiction over such claims where the judgment creditor is attempting to establish the new defendant's liability for the original judgment. *Id.* at 868-69.

The Ninth Circuit Court of Appeals determined *Peacock*

was distinguishable because the trust was not attempting to establish liability on behalf of the defendants to the supplementary proceeding for the original judgment. Rather, the Trust was seeking to disgorge from Petitioners property that was fraudulently transferred to them. The Ninth Circuit Court of Appeals did note that this Court expressly declined to address the issue presented in this case. *Peacock,* 116 S. Ct. at 868 n. 6.

Moreover, *Peacock* is consistent with the opinion of the Ninth Circuit Court of Appeals in this matter. This Court noted in *Peacock* that, "[w]e have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments. . . ." *Id.* at 868. Similarly, the exercise of jurisdiction in this case is a proper use of the federal court's inherent power to enforce its judgments. Thus, *Peacock* is consistent with the opinion of the Ninth Circuit Court of Appeals in this matter.

III.

FACTUAL DISPUTES AND ASSERTIONS THAT A COURT MISAPPLIED A PROPERLY STATED RULE OF LAW DO NOT MERIT REVIEW BY THIS COURT.

This Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon analysis of the particular facts involved. This Court has stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). This Court is even less likely to take a case to review a factual issue where the findings of fact made by the district court received the concurrence of the court of appeals. In that situation, this Court has stated, "A court of law, such as this court is, rather than a court for correction of errors in fact finding,

cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This Court has made it very clear that,

> [i]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). The present case does not fall under either heading.

Petitioners argue the court below did not comply with various legal standards. However, the courts below decided the majority of the issues on the basis of factual determinations. There were no erroneous legal determinations. Moreover, the decision below neither presents a real or embarrassing conflict with other authorities or presents issues the settlement of which is of importance to the public as distinguished from the parties.

A. The Preliminary Injunction

Upon entering the preliminary injunction, the district court found,

> Jack B. Buster's counsel, A. Lee Petersen, was in possession of $125,000.00 that this court understood was to be used by defendant

> Buster in order to post a supersedeas bond. Based on evidence presented to this court, there is a substantial likelihood that the $125,000.00 are proceeds of transferred assets which are the subject of plaintiff's fraudulent conveyance action and covered by the February 19, 1993, temporary restraining order. **There is an appreciable risk that defendant Jack Buster or the other impleaded defendants will dispose of these funds prior to resolution of plaintiff's fraudulent conveyance action.** If these funds are dissipated, irreparable harm will be incurred by plaintiffs.

(RA. 3a.) (Emphasis added.) Petitioners are asking this Court to reconsider the district court's conclusion that the Trust would suffer irreparable injury. This factual finding received the concurrence of the court of appeals. Thus, this conclusion merits no review by this Court. Petitioners claim the district court granted the preliminary injunction without any showing that the Trust would suffer irreparable injury. However, the Ninth Circuit Court of Appeals concluded,

> The record clearly reveals that there is no merit in Buster's contentions that the district court failed to consider the requisite factors for preliminary injunctive relief — i.e., the likelihood of success on the merits and irreparable injury — and that the district court failed to give Buster notice that the injunction could include the requirement of a $125,000.00 deposit with the registry of the court.

(A. 22.)

Petitioners also claim that as to "the Johnson parties" the deposit requirement was clearly a prejudgement attachment of their property. Further, they claim the court did not hold a hearing as required. However, the Ninth Circuit Court of Appeals found,

> The court heard argument on the proposed injunction and found that Thomas, Head's fraudulent conveyance claims were likely to succeed. The Johnson parties claim in no way implicates the court's inherent authority or jurisdiction to enter an order to preserve the possibility of equitable remedies. . . . The $125,000.00 does not represent a money judgment for damages.

(A. 25.) Petitioners repeatedly overlook the finding of the district court that there was a substantial likelihood that the $125,000 were the proceeds of fraudulently conveyed assets. (RA. 3a.) Petitioners' characterization of the preliminary injunction as a prejudgment attachment is simply another means of asking this Court to reconsider this evidentiary determination.

Accordingly, the issuance of the preliminary injunction merits no review by this Court. Additionally, it is important to note that the Petitioners failed to appeal the entry of the preliminary injunction. Rather, Petitioners challenged the preliminary injunction on appeal of the default judgment.

B. The Default Judgment

The decision below upholding the entry of default judgment was based on several facts and what the Ninth Circuit Court of Appeals termed, "the overwhelming evidence supporting Thomas, Head's request." (A. 33.) The facts supporting the entry of default judgment are as follows:

1. The district court expressly requested briefing in response to the Trust's motion for an order to show cause;

2. Buster failed to respond to the court's request;

3. Although the other Petitioners did file a brief, they presented no admissible evidence to support their claim they could not comply with the preliminary injunction;

4. The record reflects that Petitioners did not request a hearing in response to the Trust's motion for an order to show cause;

5. The district court's order provided that default would be vacated upon compliance with its preliminary injunction; and

6. Petitioners failed to comply throughout the following year prior to the entry of default judgment.

(A. 27-31.)

The decision to enter default judgment was based on these facts. Any review of the appropriateness of the default judgment would require a review of the evidence and discussion of the specific facts. Ordinarily, this Court does not grant certiorari to review evidence and discuss specific facts. *Johnston*, 268 U.S. at 227. Accordingly, discretionary review is not warranted.

Petitioners argue the district court did not adhere to a "five step process" before imposing sanctions. Petitioners made this same argument below. However, the Ninth Circuit Court of Appeals determined Petitioners "had ample notice and opportunity to respond to the possibility that the court would find them in contempt." (A. 32.) The Ninth Circuit Court of

Appeals was persuaded by the fact that Petitioners had not asked for an evidentiary hearing in response to the Trust's motion for an order to show cause. (A. 32.) Also, the district court's order provided that default would be vacated upon compliance with its preliminary injunction and Petitioners failed to comply throughout the following year. (A. 32.) Additionally, Petitioners presented no admissible evidence to support their claim they could not comply with the preliminary injunction. These facts support the entry of default judgment without an evidentiary hearing.

C. Westwood Acres' Rule 60(b)(4) Motion

The default judgment set aside Buster's transfer of certain interests in Westwood Acres, and directed Westwood Acres to pay to the Trust all present and future shares and all distributions, credits, draws or payments which would have paid to Buster for his general and/or limited partnership interest in Westwood Acres until the underlying judgment was satisfied. Westwood Acres raises several arguments based on the theme that the default judgment affected its property and that the court lacked jurisdiction because Westwood Acres was not a party to the proceeding.[4]

Federal Rule of Civil Procedure 60(b), provides in relevant part "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

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4. Westwood Acres argues at some length that orders appointing a receiver for Westwood Acres violated provisions of Alaska Law. However, Westwood Acres did not appeal these orders. The Ninth Circuit Court of Appeals determined the issues were not before it on appeal. Accordingly, they are not properly the subject of briefing to this Court. The only issue properly before this Court was Westwood's claim that the default judgment was void under Federal Rule of Civil Procedure 60(b)(4).

judgment, order, or proceeding for the following reasons: . . . . (4) If the judgment is void; . . . ." A judgment is not void merely because it is erroneous. It is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law. *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985). As discussed above, the determination of the Ninth Circuit Court of Appeals that it had subject matter jurisdiction is not in conflict with a decision of this Court and does not merit this Court's discretionary review. Additionally, the court had supplementary jurisdiction pursuant to Alaska Rule of Civil Procedure 69, to hear the fraudulent conveyance proceeding.

The Ninth Circuit Court of Appeals determined the default judgment did not deprive Westwood Acres of property without due process of law. This determination was based on the fact that Westwood Acres had no property right in the distributions to which Buster would otherwise have been entitled. This determination is contrary to the assertion of Petitioners that the district court invaded the limited partnership, its membership and property in the default judgment. To the extent the default judgment affected a property right of Westwood Acres to control the sale of the limited partnership interests in the partnership, the Ninth Circuit Court of Appeals determined that right was not violated because the general partner was involved in the proceedings. Further, Westwood Acres had notice of the proceedings through its general partner and could have intervened at an earlier date. Each of these determinations was necessarily based on a prediction by the Ninth Circuit Court of Appeals as to how the Alaska Supreme Court would decide these issues. These are not issues of federal law. As noted above, this Court ordinarily defers to the views of a court of appeals on issues of state law within its circuit. *Butner v. United States*, 440 U.S. 48, 58 (1979). Moreover, settlement of these issues is

not of importance to the public as distinguished from the parties. For these reasons, this issue does not merit this Court discretionary review.

CONCLUSION

For the reasons discussed above, Respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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Counsel of Record
THOMAS L. HAUSE
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APPENDIX A — PRELIMINARY INJUNCTION FILED AUGUST 4, 1993

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Lawyers for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A89-071 Civil

THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD,

Plaintiffs,

v.

JACK B. BUSTER, TERRY D. PARKS and NORTHERN FINANCIAL,

Defendants.

THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD,

Plaintiffs,

v.

Appendix A

JACK B. BUSTER, JANICE SUE BUSTER, a/k/a JANICE SUE JOHNSON, HORIZONS WEST, INC., an Oregon Corporation, DAVID J. BERG, MARJORIE A. BERG, CARL L. CASEY, SCORPIO, INC., an Alaska Corporation, WESTERN INVESTMENT TRUST, and SUSAN BENEDICT, TRUSTEE of the WESTERN INVESTMENT TRUST,

Defendants.

PRELIMINARY INJUNCTION

Upon motion of plaintiffs, this court finds and concludes that:

1. During the pendency of the *Thomas, Head & Greisen Employees Trust, Ronald E. Greisen and Henry P. Head v. Jack B. Buster, Terry D. Parks and Northern Financial,* Case No. A89-071 Civil, defendant Jack B. Buster has either transferred or caused to be transferred virtually all of his assets to Mr. Buster's wife, Janice Sue Buster, or entities owned by Janice Sue Buster. Some of these assets have now been transferred to other entities or individuals named as defendants in the above-captioned supplementary proceeding.

2. There is an appreciable risk that defendant Jack Buster or the impleaded defendants will cause additional transfers to be made or will dispose of assets which plaintiffs allege were fraudulently conveyed by Jack B. Buster and/or the other impleaded defendants. Defendant Buster is asserting that he is now insolvent. Therefore, the transferred assets may be the only assets which are available to satisfy plaintiffs' judgment. If additional transfers are made, or if the transferred assets are disposed of before plaintiffs' fraudulent conveyance proceeding

is resolved, irreparable harm will therefore be incurred by plaintiffs.

3. Jack B. Buster's counsel, A. Lee Petersen, was in possession of $125,000 that this court understood was to be used by defendant Buster in order to post a supersedeas bond. Based on evidence presented to this court, there is a substantial likelihood that the $125,000 are proceeds of transferred assets which are the subject of plaintiffs' fraudulent conveyance action and covered by the February 19, 1993 Temporary Restraining Order. There is an appreciable risk that defendant Jack Buster or the impleaded defendants will dispose of these funds prior to resolution of plaintiffs' fraudulent conveyance action. If these funds are dissipated, irreparable harm will be incurred by plaintiffs.

NOW THEREFORE, IT IS HEREBY ORDERED that Defendant/Debtor Jack B. Buster, as well as Defendants Janice Sue Buster, a/k/a Janice Sue Johnson, Horizons West, Inc., Carl L. Casey, Scorpio, Inc., Western Investment Trust and Susan Benedict, Trustee of the Western Investment Trust, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, are hereby forbidden from selling, transferring or in any manner disposing of any assets which Mr. Jack B. Buster or Scorpio, Inc. had an ownership interest in from February 29, 1989 forward which are not exempt from execution including, but not limited to Mr. Buster's ownership interest in any corporation or partnership which includes, but is not limited to, Scorpio, Inc., Photo Express Image Centers, Inc., Westwood Acres, Kavik Valdez, Kavik Kenai, and Kavik Mortgage until further order of this Court.

Appendix A

IT IS FURTHER ORDERED that Defendant/Debtor Jack B. Buster and Janice Sue Buster are hereby forbidden from seeking or obtaining an order or judgment from any court ratifying and enforcing the provisions of any instrument of conveyance including, but not limited to, the Separate Property Agreement entered into between Jack B. Buster and Janice Sue Buster.

IT IS FURTHER ORDERED that pending further order of this Court, the Defendants identified above are hereby forbidden from selling, transferring, or in any manner disposing of any real property, including the rents and profits produced by such real property, including but not limited to, the following:

Lot Twenty-Seven (27), WOODSIDE EAST UNIT NO. 2, according to Plat No. 73-101, being within the Anchorage Recording District, Third Judicial District, State of Alaska;

Tract Two (2) of T7N, R12W, Section 27, BIG SKY SUBDIVISION, according to the official plat thereof, filed under Plat No. 76-57, records of the Kenai Recording District, Third Judicial District, State of Alaska;

Portion of Alaska Tideland Survey 674, records of the Valdez Recording District, Third Judicial District, State of Alaska;

Section 14, T17N, R2E, Seward Meridian (M/B SE1/4), records of the Palmer Recording District, Third Judicial District, State of Alaska;

Appendix A

Lot Six "A" (6-A), Block Two (2), PEARL V. SMITH ADDITION, according to the official plat thereof filed under Plat No. P-5666, records of the Anchorage Recording District, Third Judicial District, State of Alaska;

Lots Nineteen (19) & Twenty (20), Block Three (3), and Lots Three (3) and Four (4), Block Six (6) BLACK GOLD SUBDIVISION, according to the official plat thereof filed under Plat No. K1399, records of the Kenai Recording District, Third Judicial District, State of Alaska;

Lots Ten (10) through Eighteen (18), Block One (1) and Lots Eleven (11) through Fifteen (15), Block Three (3) HIGHLAND SUBDIVISION, according to official Plan K-1542, Kenai Recording District, Third Judicial District, State of Alaska;

Tract Three (3), BIG SKY SUBDIVISION, according to the official plat thereof, recorded at Plat No. 76-57, in the Kenai Recording District, Third Judicial District, State of Alaska;

That portion of Southeast one-quarter (SE 1/4) of Section 14, Township 17 North, Range 2 East, Seward Meridian, being within the Palmer Recording District, Third Judicial District, State of Alaska described as follows:

Beginning at the Northeast corner of Lot 4 of parcel 1, of the revised Bodenberg Creek Subdivision according to the official plat on file in Book 12 at Page 282, run thence N 2° 11' 00" W a distance of 200.00 feet to the true point of beginning; thence S 89° 57' 00" W a distance of 100.00 feet; thence N 19° 08' 00" a distance of 676.60 feet to the

North-South centerline of said Section 14; thence 89° 57' 00" E a distance of 297.39 feet to the westerly right of way line of the Glenn Highway; thence S 2° 11' 00" E a distance of 639.82 feet to the true point of beginning.

IT IS FURTHER ORDERED that pending further order of this Court, the Defendants identified above are hereby forbidden from selling, transferring or in any manner disposing of the beneficial interest in and proceeds obtained from any deed of trust or deed of trust note covering the following property:

Lot Sixteen (16), Block Five (5), ROOSEVELT PARK SUBDIVISION, according to Plat No. P-57A, in the Anchorage Recording District, Third Judicial District, State of Alaska;

Lots Seventeen (17) and Eighteen (18), Block One (1), HIDEAWAY HAVEN SUBDIVISION, according to Plat 86-63, being within the Kenai Recording District, Third Judicial District, State of Alaska;

Lot Two (2), Block Two (2), CHAR-DEE SUBDIVISION, according to Plat 74-66, being within the Palmer Recording District, Third Judicial District, State of Alaska;

The West Seventh-Eight (78) feet of Tract Four (4), NELS SANDS SUBDIVISION, according to Plat P-53, being within the Anchorage Recording District, Third Judicial District, State of Alaska;

Real property within the Valdez Recording District, State of Alaska, known as A.T.S. No. 674: Beginning at Corner

Appendix A

No. 4 USS 495 thence S. 62° 55' 42" E. to Corner No. 1 a common corner to Corner No. 1 ATS 623 the true point of beginning, thence by metes and bounds: S. 10° 00' 00" E. 600.00 ft. to Corner No. 2 S. 80° 00' 00" W. 190.00 ft. to Corner No. 3 N. 10° 00' 00" W. 440.00 ft. to Corner No. 4 N. 80° 00' 00" E. 30.00 ft. to Corner No. 5 thence to the left along a curve whose radius is 20.00 ft. a distance of 31.42 ft. to Corner No. 6 thence No. 10° 00' 00" W. 100.00 ft. to Corner No. 7 thence to the right along a curve whose radius is 40.00 ft. a distance of 62.83 ft. to Corner No. 8 thence N. 80° 00' 00" E. 100.00 ft. to Corner No. 1 the true point of beginning, containing 2.428 acres. Approximate latitude at Corner No. 1 61° 07' 30". Approximate longitude at Corner No. 1146° 20' 30".

IT IS FURTHER ORDERED that the share certificates of Scorpio, Inc., shall be immediately delivered to this Court pending a determination by this Court as to whether the shares were fraudulently transferred by Mr. Buster to his wife, Janice Buster, or a corporation owned by Janice Buster.

IT IS FURTHER ORDERED that in view of the serious allegations that funds fraudulently have been transferred or dissipated by defendants which would be otherwise available to satisfy plaintiffs' judgment, defendants identified above are ordered to deposit $125,000 into the registry of the court on or before 12:00 p.m., August 9, 1993, these funds to be held by the Court pending a resolution of plaintiffs' fraudulent conveyance action.

This Preliminary Injunction shall remain in effect until further order of this Court.

Appendix A

IT IS SO ORDERED this 4th day of August, 1993, at Anchorage, Alaska.

s/ illegible
United States District Judge

CC:

FINANCIAL DEPUTY
A. L. Peterson
R. BLISS
M. Coryell

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF ALASKA IN *DENALI FEDERAL CREDIT UNION, ET AL. V. SUSANNE LANGE* DATED OCTOBER 17, 1996

THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-6610

Superior Court No.
3AN-86-14997 CIV

[No. 4413 - October 17, 1996]

DENALI FEDERAL CREDIT UNION, formerly known as ALASKA RAILROAD FEDERAL CREDIT UNION,

Appellant,

v.

SUSANNE LANGE,

Appellee.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Reese, Judge.

OPINION

Appearances: Roy Longacre, Longacre & Associates, Anchorage, for Appellant. Jill Dean, Law Office of Jill Dean, Anchorage, for Appellee Susanne Lange.
Before: Compton, Chief Justice, Rabinowitz, Matthews and Eastaugh, Justices. [Fabe, Justice, not participating]

COMPTON, Chief Justice.

Appendix B

I. INTRODUCTION

Denali Federal Credit Union (Denali) appeals the superior court's denial of its motion for a writ of execution. We reverse.

II. FACTS AND PROCEEDINGS

In May 1985 Denali (formerly the Alaska Railroad Federal Credit Union) filed a civil action against William Lange, Lange's business partner Ted Hanson, and their partnership, Nugget Properties. Denali alleged the defendants were in default on loans totaling over $1 million.

In August 1985 William Lange conveyed his interest in four properties to his wife, Susanne Lange, for $10. She, in return, assumed personal responsibility for business debts of William Lange's unrelated to this action. There is evidence in the record that one of the four properties was worth $700,000.

In November 1985 William Lange and Hanson signed a confession of judgment for $1,070,000, plus interest, in Denali's favor. Denali agreed not to seek entry of judgment if William Lange and Hanson met the payment schedule established by the parties' settlement. William Lange and Hanson failed to make the first payment under the settlement schedule. Denali moved for entry of judgment. In February 1987 the superior court entered judgment against William Lange and Hanson for $1,187,700.

In 1991 Restaurants Northwest Inc. (RNI), a restaurant franchisee in which William Lange owned an interest, filed for bankruptcy. The bankruptcy proceeding focused in part on whether William Lange's 1985 transfer of property to his wife

violated RNI's right of first refusal to one of the properties. In the context of that issue, the bankruptcy court stated:

> Maybe what the implication here is that [William Lange] was in severe financial trouble, and [Susanne Lange] just wanted to get everything in her name because it was better for them. . . . I think they were trying to hide this from their creditors, but what they really did was transfer it to Mrs. Lange. And it was a transfer for essentially no consideration. It wasn't a, quote, purchase in the real world. It was just a transfer for their various purposes, which were distinct. She thought she had an interest in it. Secondly, she wanted to protect her family. Thirdly, it apparently wasn't going to hurt Mr. Lange anyway 'cause [sic] he was about to lose it. And fourthly, the [RNI] document didn't prevent transfer, it only . . . provided for a purchase.

In September 1993 Denali moved for a writ of execution on the 1987 judgment against two of the properties William Lange had conveyed to his wife. Denali alleged the conveyance was fraudulent. Susanne Lange moved for and was granted leave to intervene. She requested a jury trial on the question whether William Lange had any remaining interest in the properties.

The superior court denied Denali's motion without explanation or an evidentiary hearing. Denali appeals.

Appendix B

III. DISCUSSION

A. *Appellate Jurisdiction*

Susanne Lange argues that this court does not have jurisdiction to hear Denali's appeal because the superior court did not enter a final judgment. *See* Alaska R. App. P. 202(a) ("An appeal may be taken to the supreme court from a final judgment entered by the superior court . . . ") . The finality rule "does not necessarily require the entry of a final judgment." *Borg-Warner Corp. v. AVCO Corp.*, 850 P.2d 628, 635 (Alaska 1993). To determine finality, "the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment. . . ." *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1030-31 Alaska 1972), *overruled on other grounds by City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 (Alaska 1979). A final, appealable "judgment" is one that, however denominated, "disposes of the entire case and ends the litigation on the merits." *Borg-Warner Corp.*, 850 P.2d at 634.

The superior court may have denied Denali's motion with the understanding that it could not be granted without first adjudicating the fraudulent conveyance issue. However, once the motion was denied, "there was nothing that [Denali] could do to further prosecute the action it had commenced." *City of Fairbanks v. Electric Distribution System*, 413 P.2d 165, 168 (Alaska 1966). The denial of Denali's motion therefore had the effect of disposing of the case and ending the litigation. *See Mallonee v. Grow*, 502 P.2d 432, 434 n.2 (Alaska 1972) ("The effect of [denying a motion for a writ of execution] is that the plaintiff could not thereafter collect his judgment by execution."). The superior court's order "was a final judgment and appealable

as such." *City of Fairbanks*, 413 P.2d at 168; *see Mallonee*, 502 P.2d at 435 ("Since the order was a final one terminating the proceeding, we regard it as a final judgment from which an appeal may be taken.").

B. *The Fraudulent Conveyance Issue*

When a third party claims an interest in property against which a judgment creditor seeks to execute, the superior court must first determine the interests of the third party claimant. *See Keltner v. Curtis*, 695 P.2d 1076, 1079 n.4 (Alaska 1985). After this determination is made, "buyers at the execution sale will be certain that the judgment debtor is the sole owner of the property, and thus will not be discouraged from bidding what they think is the full value of the property." *Id.* In the present case Susanne Lange argued that she, and not judgment debtor William Lange, owned the property against which Denali sought to execute. In response, Denali raised genuine issues of material fact regarding whether William Lange's conveyance to Susanne Lange was fraudulent. *See Burgess v. Burgess*, 710 P.2d 417, 421 (Alaska 1985) ("[A] fraud is committed when one spouse, without consideration, transfers property to the other in order to place the property beyond the reach of creditors."). The fraudulent conveyance issue should have been resolved before the court ruled on Denali's motion. *Keltner*, 695 P.2d at 1079 n.4.

Furthermore, resolution of the fraudulent conveyance issue should have been by jury trial, since that is what Susanne Lange demanded. *Cf. Keltner*, 695 P.2d at 1079 ("[A] party to a proceeding adjudicating ownership of personal property should be entitled to a jury trial."). A jury trial demand, once made, may not be withdrawn without the consent of the other parties

to the action. Alaska R. Civ. P. 38(d); *see Hill v. Vetter,* 525 P.2d 529, 531 (Alaska 1974). On remand, absent such consent from Denali, the fraudulent conveyance issue must be tried by a jury.

IV. CONCLUSION

The superior court's denial of Denali's motion for a writ of execution is REVERSED. This case is REMANDED for a jury trial on the issue of whether William Lange's conveyance to Susanne Lange was fraudulent.

REVERSED and REMANDED.